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MEMBERSHIP

The Executive Committee in January approved the organization and Plan of the Membership Committee. That Committee is now composed of one member from each of the eleven membership districts into which the states and territories have been divided, together with the former Presidents of the Association, who are acting as an Advisory Committee. The organization provides for District Directors, State Directors and County Advisers, thus covering the field fully. County Advisers are entrusted with the important task of preparing a list of members of the bar in their counties who would be desirable recruits and, after the names receive the proper approval, of securing their applications. The project is important and will no doubt enlist the enthusiastic co-operation of the members of the Association.

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AMERICAN BAR ASSOCIATION
JOVRNAL

JULY, 1921

Chief Justice Taft

William H. Taft, the newly appointed Chief Justice of the United States, took the oath of office in Washington on July 11. This simple but supremely important ceremony took place in the office of Attorney General Daugherty. The oath was administered by Justice Hoehling of the District Supreme Court, in the absence from the city of the Justices of the U. S. Supreme Court. Chief Justice Taft's brother, Henry W. Taft, of New York, was present. Immediately after taking the oath the new Chief Justice went to the White House to pay his respects to President Harding. This appointment is naturally the most important recent event from the standpoint of the legal profession. An appreciation of the new Chief Justice is contained in this issue.

Tribute to the Late President Blount

Deserved tribute is paid to the life and services of the late President William A. Blount of the American Bar Association in a leading editorial in the Minneapolis Morning Tribune of June 21. Mr. Rome G. Brown, president and executive manager of that newspaper, is responsible for the editorial. Mr. Brown is well qualified to judge of the merits of public spirited service to the American Bar Association. He himself played a conspicuous and highly effective part in the campaign against the recall of Judges and judicial decisions. Following is the editorial:

AN AMERICAN LAWYER

In the closing days of his year's service as president of the American Bar Association, William A. Blount, of Pensacola, Florida, died last Wednesday, at the Johns Hopkins Hospital, Baltimore, Maryland. Well known in Minnesota by those lawyers of this state who had the privilege of contact with him during his many years of service with the American Bar Association, Mr. Blount was a representative American lawyer. His death deprives the American Bar of a member of the highest standing in character and efficiency.

He prepared for his profession at the University of Georgia, where he graduated with the highest honors, both in the Bachelor of Arts course and in law. In his own state of Florida he was pre-eminently the leader of the bar. He was a member of the Florida Constitutional Convention of 1885, and chairman of many state commissions from time to time to revise the statutes of his state and to simplify the system of pleading and practice in Florida courts.

He was for years a Florida member of the National Conference of Commissioners on Uniform State Laws and was responsible, perhaps more than any other one lawyer, for the preparation and adoption by the various states of uniform state legislation upon commercial and other subjects, and thereby the elimination of unnecessary conflict of laws as to rights or remedies in business and other matters which involve inter-state relations. He attained a deserved leadership in the deliberations of the American Bar Association and of the National Conference of Commissioners on Uniform State Laws, of which latter he was president during the two years preceding his election, in 1920, as president of the American Bar Association.

While Mr. Blount's success in his profession gave him pre-eminence as a practitioner, his great accomplishments were through his constructive work in connection with the building up of the legal systems of his own state and of the nation.

In both phases of his activities he was always a thorough student and showed up at the critical moment with the utmost preparation. He presented his points with such clearness and incisiveness of statement and in such logical form as to compel conviction. He was always considerate of the opinion of others and judicial in his approach to and consideration of any subject. He was a high class Southern gentleman, genial, lovable, a loyal friend and inspired in others the utmost friendship and respect.

The news of his sudden death, in this, the seventieth year of his life, will be a great shock to thousands of American lawyers who had the privilege of his acquaintance.

Reduced Fares for Annual Meeting

Members who expect to attend the annual meeting of the Association should note carefully the dates on which tickets are on sale in their territory. These are given below. They should also remember to ask for a certificate—not a receipt—at time of purchase, and to present it to the endorsing officer, W. Thomas Kemp, immediately on their arrival at Cincinnati, in order to secure a half fare rate on the return trip. Members in New England Passenger Association territory and certain parts of the Trans-Continental Passenger Association territory, in which no fare concession is made, should read carefully the method by which they may secure a reduction.

Central Passenger Association territory on August 23 and 24 and August 27 to September 2. This territory extends from Chicago, St. Louis and Cairo, to Buffalo and Pittsburgh, including the territory north of the Ohio River and extending as far north as the lower Peninsula of Michigan, inclusive.

Trunk Line Association territory, August 22 and 23 and August 27 to September 2. This covers the territory east of Buffalo and Pittsburgh, and north of the Potomac River, but not including the New England States.

Southeastern Passenger Association territory, August 22, 23, 24 and August 27 to September 2. This covers all of the states east of the Mississippi river and south of the Ohio and Potomac Rivers.

Southwestern Passenger Association territory, August 23, 24 and August 27 to September 2 from Arkansas and Louisiana; and August 22, 23, 24 and August 27 to 31 from other points. This territory covers Texas and other southwestern states west of the Mississippi River.

Western Passenger Association territory, August 23, 24 and August 27 to September 2, from Illinois, St. Louis, Hannibal, Mo., and Keokuk, Iowa; also August 22, 23, 24 and August 27 to 31 from other points in Western Passenger Association territory. This territory extends from Chicago and St. Louis as far west as the eastern boundary line of California, Nevada, Oregon and Washington.

Trans-Continental Passenger Association territory, August 21, 22, 23 and August 26 to 30 from Oregon (except points south of Portland), the entire state of Washington, and from points on the Great Northern Railway located in British Columbia.

From California and other Pacific Coast stations from which certificate plan concessions are not applicable members can avail themselves of round trip tickets on sale to Chicago and St. Louis, and at the latter points purchase one-way tickets to Cincinnati, at the same time asking for a certificate; full information as to detail fares and governing conditions can be obtained from Pacific Coast ticket agents.

The Trans-Continental Passenger Association territory covers traffic from Pacific Coast States.

New England Passenger Association territory, which includes the New England States, has no arrangement for reduced fares. However, members in those States can purchase a ticket to the nearest point in Trunk Line Association territory, and there purchase a ticket, on the above selling dates, to Cincinnati and secure a certificate which, when validated, entitles the holder to half fare on the return trip to the point in Trunk Line territory. Ticket agents in New England can advise members as to the best points outside of New England Association territory at which to purchase tickets and secure certificates.

Death of Mr. James D. Maher

The death of Mr. James D. Maher, clerk of the Supreme Court of the United States, following so closely upon that of Mr. Chief Justice White, was a great shock to his many friends, included among whom are the leading members of the legal profession throughout the country. Mr. Maher had been identified with the clerk's office since his boyhood, and his thorough and accurate knowledge of all matters of practice and procedure, combined with his lovable personality, unfailing courtesy, and readiness to respond to requests made of him, won for him not only the respect but the sincere love of all persons having business before the court, to whom his death brings with it a sense of personal loss. His administration of his important duties was such as to make it a real pleasure to transact business with his office. To his associates in the office, whose loyalty and efficiency he greatly appreciated, we extend assurances of our sincere sympathy.

The great esteem in which he was held by the court was well expressed in the tribute paid him by Mr. Justice McKenna.—*The Washington Law Reporter* (June 12).

Carnegie Foundation Bulletin

Announcement is made of the early publication of Bulletin Number Fifteen, entitled "Training for the Public Profession of the Law;" subtitle, "Historical Development and Principal Contemporary Problems of Legal Education in the United States, with some Account of Conditions in England and Canada," by Alfred Zantzinger Reed; 420 pages octavo of text, excluding Appendix and Index. Owing to labor difficulties, the precise date of publication cannot now be set, but it is expected to be not later than August 15th.

This volume is an outcome of a study of legal education and cognate problems, originally undertaken at the request of the Committee on Legal Education of the American Bar Association. The Foundation will be glad to distribute copies gratuitously to members of the Association, on written application to its Division of Educational Enquiry, 522 Fifth Avenue, New York City.

Tributes to the Late Chief Justice

Tributes to the late Chief Justice from the press and public have been numerous and sincere. They range from keen appreciation of his judicial ability to a note of affection for his likable personality. That of Mr. Justice McKenna, Senior Associate Justice, from the Bench on May 31 was highly impressive. The Memorial exercises held in the rooms of the Louisiana Supreme Court at New Orleans on May 26 were also striking. "The people are not generally attracted by the personality of great jurists," says a recent editorial in the New York Herald, speaking of his personal side; "but in White the man outshone the Judge. No human side of him was as attractive as the intellectual was admirable. The benevolence, the good temper, the gentle nature, all the traits which have endeared statesmen of the McKinley type to Americans were present in the great man from Louisiana."

SIGNED ARTICLES

As one object of the AMERICAN BAR ASSOCIATION JOURNAL is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this JOURNAL assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

SOME LEGAL PHASES OF THE WAR*

Reminiscences of Legislative Steps Taken to Overcome Our Legal Unpreparedness at Outbreak of Hostilities and of Methods of Dealing With Contracts, Conscientious Objectors and Other Problems

By NEWTON D. BAKER

Former Secretary of War and Member of Cleveland, O., Bar.

MR. PRESIDENT, Ladies and Gentlemen of the Bar: Only those who have been separated from the bar by some other calling for a longer or shorter time can realize the joy with which a man returns to his chosen profession. This is not a time to indulge in purely personal reminiscence, and yet I think I may be permitted to say that, fascinating and inspiring as the duties in Washington were, dramatic as its episodes were at every point, and absorbing as its responsibilities were, there has been no moment in the last five years when, if my fancy had leave to roam, it did not return with an arrow's flight to this spot, to this profession, and when I have not held before my eyes, as a solace for the work I have had to do, the feeling that at least some day I should be permitted to come back and finish the unfinished career at the bar which I started here so many years ago so hopefully, and which has been so generously seconded by the members of this great profession.

In justice to you, I ought perhaps to have declined the invitation to attend this dinner. When it came I wrote Mr. Grossman and Mr. Sullivan that I feared I could not prepare an address worthy of the occasion. I admitted I was tired at the end of five rather hard and long years; I knew that I would not have about me the data, memoranda and records which in moving get separated from a man, and which he gets united with again only when the movers have done their best, or their worst, as the case may be. So I said if coming meant merely an effort on my part to give you some idea of the way the law works in war times, as a casual reminiscence, spontaneously gathered as I spoke to you, I would be willing to come. I am telling you this because I ask such forbearance and consideration as you can give to my somewhat scattered talk.

The United States differs from every other country in the world. There is perhaps no single difference between it and every other country as great as the attitude we have in peace times toward war and preparation for war. We indulge the belief about ourselves that we are a peace-loving people; we know that our intentions are righteous and our purposes pure. Whether or not it is a native virtue with us, or whether it is because we are still exploiting a virgin continent whose natural resources are still unexhausted and seem inexhaustible, or that we have not yet met the problems of congestion; whether any of these be the reason, nevertheless we do regard ourselves as a people who have no aggressive intentions toward anybody else and who are slow to believe that others can have aggressive intentions toward us.

We have never even organized our government as many older governments are organized. In some ways the British Government, for instance, is more nearly a trading corporation than it is an agency of government as we understand it. Practically every function of the British Government is organized for and associated directly with expansion of the trade of the Empire, and all questions of foreign and domestic policy are considered by the governing agencies of the British Empire from the point of view of their effect upon British trade.

Our Government, on the other hand, is constructed in harmony with that ancient maxim of political philosophers—that the least government is the best government. We are fond of saying to ourselves that we want more business in government and less government in business, and therefore we have allowed trade and the other international interests which flow from trade more or less to take care of themselves, and have set up as the thing we call government a system of institutions which will carry us along and prevent conflict of persons among themselves and with the state, but have never injected into the construction of our laws any reflection whatever of national purpose or national ambition extending beyond our own shores.

As to preparation for war, the difference is even more noteworthy. We have heard a great deal in recent months about the lack of preparation with which the United States went into the war. Relatively, to what it was afterwards necessary for us to do, our lack of preparation was total; but this was not because of anybody's fault, but because of the inherent nature of our institutions and our traditional and constant attitude toward war. I have had men say to me that it would have been wiser, in fact, that it was the duty of the Federal Government, to have prepared long in advance of our entry into the World War; and yet I need only suggest to you that the only preparation which could have been made, which was not made, would have been to have somebody go down to the Congress and ask them to appropriate $500,000,000 or $1,000,000,000 in order to enable us to get ready to go into a war which, by all accounts, we were endeavoring to stay out of, and which I personally believe those highest in authority hoped to the very last we would be able to stay out of.

I do not know how familiar any of you may be with the way the mind of the Congress works, but I can imagine no more futile errand than would have been that of the Secretary of War who went down to Congress at any time prior to March, 1917, and requested an appropriation of $500,000,000 for war preparation. He not only would not have gotten the money, but if he had merely requested the passage of laws which would have organized the agencies of the Government for participation in the war, laws which

*Address delivered by Hon. Newton D. Baker at a meeting of the Cleveland (O.) Bar Association on March 29, 1921, in response to an address by President John J. Sullivan of the Association welcoming the former Secretary of War to his old home and place at the Bar.

would have been responsible for the material and spiritual organization necessary to be effected in the United States to put us on a war basis, he would have secured only debate and refusal. The very idea of passing such laws in peace times is repugnant to the whole course of American thought. How different we are from Germany or France in this regard. For instance, when the German emperor declared general mobilization in Germany, every citizen of that empire had in his pocket, and it had been in his pocket for years, a card which told him exactly where to go, how many hours it would take to get there, what he was to do when he did get there, with whom he was to be associated, who was to be under his care and guidance; so that the publication of notice on bulletin boards throughout the empire that general mobilization had been declared threw that country at once, instantaneously, into a complete state not only of manhood mobilization, but of governmental dominance over industrial and financial affairs which was as complete at its beginning as it was at the end of their participation in the war.

I have down at my office a postal card—I have forgotten the name of the man to whom it was addressed, but it was some French citizen. On the day that France declared mobilization some millions of these cards, all written up in advance, were dropped into the postoffices of France. Every man of military age in France, the next morning after mobilization was ordered by the French Cabinet, received a postal card which told him that the republic had summoned him to its defense, and that he should report in accordance with previously given instructions. From then on all that it was necessary for the Frenchman to do was to obey instructions worked out according to what the French military staff had planned in advance, known as the plan of mobilization, and France was instantly mobilized; not only her army, her people having been trained in the military art, but her industries were taken over, her railroads went under immediate government management, and, in many cases, government ownership. Her canal systems, her factories, her stocks of merchandise and goods, were all instantly, and by that act, brought under the absolute control of the government under a system of laws and regulations enacted long in advance, in anticipation of just such an emergency.

Of course, England and the United States had no such advance preparation. England relied for her protection always upon her fleet; the United States relied for its protection upon the width of the Atlantic ocean on one side and of the Pacific ocean on the other. The English, however, had more laws than we which were anticipatory of a state of war, for we had none. I recall with a great deal of amusement that when we tried to discover what control the Federal Government might assert over aliens living in the Federal capital itself, we found that we were so unequipped with a legal basis for the outbreak of hostilities between the United States and any other country that the only law under which the President and those acting under him could control alien enemies living within the national capital itself had been passed in the early part of the nineteenth century, and its provisions were of such doubtful application that the attorney general was uncertain whether he could frame a proclamation which the President could sign, which would either be truthful or effective to control aliens in their machinations against the Government at its very seat.

The reluctance which has constantly kept the Congress from passing laws in anticipation of war has been well shown by what has happened since the armistice. When the army reorganization act was passed in May or June of 1920, after all the experience we had had of the suddenness with which wars come and of the scale upon which modern war must be conducted, the Congress passed very grudgingly an act fixing the size and organization of the new army, and, although they were earnestly besought by military men and by some members of Congress to include in that law a provision for the operation of the draft or selective service in the event of hostilities breaking out, they declined, saying, in effect: "No, the only law we are willing to have on our statute books is a law which will limit the size of the standing army in times of peace, and if war ever comes again we will start all over and enact such legislation as we then find to be necessary for the mobilization and guidance of the country in the emergency." So that now, notwithstanding the lessons which our recent experience might well have taught, the Congress has declined to leave upon the statute books any of the anticipatory and preparatory legislation enacted during the war or to take a step in departure from the traditional policy of complete institutional unpreparedness.

We think of ourselves as a peace-loving people. We know that we are peace-desiring people. Yet the lessons of experience tell us that with all our good disposition the United States has had its share in the wars of the world. Since this country was established in its independence, we have had, counting all wars of every kind in which the public military power of the United States has been engaged, one year of peace to each three years of war. If we count only the major domestic and foreign wars in which the country has been engaged, we have had one year of war to each three years of peace. Thus, on the doctrine of chances, taking the historical average as the thing which ought to guide us in our future conduct, we ought, it would seem by the counsels of prudence, to lay out on our statute books, as other nations have done, a plan of mobilization, a scheme which, when the emergency comes, needs but to be put into operation; and such an institutional plan should deal not merely with the method of selecting and securing soldiers and organizing them into armies—the legislative problems which the country faced during the war was very much more comprehensive than purely military law.

I have written down here twelve pieces of legislation of the major sort which were necessary to be passed by the Congress in order that the country might go upon a war basis. I read the names of these laws in order that you may realize how profoundly they organized the whole fabric of our civilization. Without them it would have been impossible for the country to have been upon a war basis. Each one of these laws dealt with a situation which might in some degree, at least have been anticipated, and each, in a highly organized and prepared country like Germany or France would have been anticipated and provided for by statutes which would lie unused when unneeded, but would be ready in emergency.

The first of these is the draft law. In our peacetime statutes we had provision only for volunteering;

even the regular army was organized on a volunteer basis. Here I want to impart a secret—at least what I am about to say has never seemed to be able to get itself published, although nobody has tried to keep it secret. I want you to know the name of the man who was responsible for the idea of the selective service law. It was Major General Hugh L. Scott, who was chief of staff at the time America went into the war. Immediately after I told him of the President's intention to read a war message to Congress General Scott said: "Mr. Secretary, the only fair way to raise an army is by application of the principle of universal service." I called a council of the principal military men in the department and with substantial unanimity they agreed that that was the wise way, the fair and effective way to raise an army, but they also agreed that it was so antagonistic to the sentiment and habits of the American people that Congress could not be expected to grant the power. General Scott, however, continued to urge the selective service as the democratic method, and I carried his suggestion to the President, who listened attentively to a statement of the plan and then said: "That is the fair way; it is the democratic way. The experience of England with the volunteer system is a warning to us; I will put a reference to it in the message which I am to read. You have the legislation drawn and we will start right from the beginning."

General Crowder was immediately called upon to draw the law. He drew it and administered it with consummate skill and manifest fairness; and I think there is no single act, no single piece of legislation connected with the war which will as surely always stand out in history as timely and wise. I am glad to have it known that it was General Scott's suggestion and that it came from him to be approved and adopted by the President.

Returning, however, to the thread of these observations, the draft law required long debate before it could be enacted; debate which might very well have been had in peace times, leaving merely the execution to be dealt with in the confusion and haste which filled the onset of hostilities.

A Moratorium for Soldiers and Sailors. The Government reached out into the homes of the people and took men whose rent, perhaps, would become due in their absence, whose little petty bills, investments in houses, whose civil rights of all sorts would be imperiled by their absence, and there was no law, in spite of the experience of the Civil War, which protected these absent soldiers or even stayed the hand of an oppressive creditor while they were away in the service of their country.

War-time Prohibition. That was one of the series of acts which surrounded the American army, after it was mobilized, with conditions quite unparalleled in the history of war and which made our army when it got to France the most sober, the sanest, the least criminal and the most effective army that has ever been assembled, so far as I know, in the history of armies; and yet all of that legislation might have been adopted by way of preparation and its final adoption came only after conditions had arisen which it would have been well to have avoided.

The Overman Act. We had an inelastic system of government, highly compartmental, each office of the Government with its limited, accurately defined powers, with no right in anybody, even the President as chief executive, to alter or modify or reassign the duties of officers so that the burden should not fall on a few shoulders. There was no power to meet emergency conditions by the creation of new offices. We had in Washington to organize volunteer groups of people who had no authority and could get no power from anybody. These groups of volunteers deliberated, argued, persuaded and advised the American people; but they had no legal right to request, much less order, until finally the Overman Act was passed, which gave the President power to readjust executive functions and to set up agencies such as the emergency of the moment might show to be necessary.

The trading with the enemy act and the espionage law were both necessary to be passed after war was declared, and yet it might easily have been foreseen that in the event of war the Government would instantly need the right and power to protect itself against the machinations of ill-disposed persons at home while its army was defending its honor abroad.

Other great statutes, dealing with questions of alien property, taxation, bonds, wheat price guarantee, food and fuel control, railroad administration and control, had to be passed. The need for them, however, was less obvious in advance. This was the first war in which nations were so completely mobilized and, so far as the United States was concerned, we had no experience which could have suggested the extent to which it would be necessary to go in many of these matters.

The point which I am making, however, is that much of this preparation could have been made in advance, and the fact that it was not forced the Government constantly to meet delicate and difficult situations which it was powerless to meet adequately, and that the executive branch of the Government was driven to makeshifts while the legislative branch of the Government debated after the fact situations for which it might have supplied the remedy in advance

I remember very well those early days when war had just been declared. Washington became the center to which everybody in the United States came, either by letter or in person. The office of every man who had any responsible connection with the war was thronged with people who wanted to know what they could do. The doctors came; it was easy to dispose of them by saying, "Go to see the surgeon general." The soldiers came; it was easy to dispose of them by saying, "Put on your uniform and report to the adjutant general." Mechanics came; it was fairly easy to dispose of them. But I despaired of finding work for lawyers! It seemed to me that I belonged to a class which had no function in war. I was to be undeceived about that, as I shall show you in a moment; but everybody came. Washington was thronged and overwhelmed. The adjutant general's mail jumped from a few thousand letters a day to four hundred thousand a day, and these letters said: "Tell us where to go; what to do. We have this or that talent; we have strong arms and willing hearts. Tell us what to do." Each asked: "Just give me my job." The sorting and distributing of these requests, the assignment of tasks in those early days, were the overwhelming and confusing burdens.

The contrast between this and the plan of mobilization of France or Germany is striking, and from it you will see that I am right in saying that a peace-loving country, an unprepared, and a preferably unprepared country like the United States, has to re-

fashion its institutions when a great emergency like this war comes upon it and has to make over the whole theory upon which it has constructed and organized its life.

Let me illustrate further by taking the question of supplies. The War Department is normally organized to supply food, clothes, shelter and arms to some two or three hundred thousand men. They are supplied by a limited number of highly trained and competent men who practically go to market with baskets on their arms and pick and choose out of the bountiful supplies of the country what they need for the army. The aggregate purchases are an insignificant part of the country's production; but when this vast mobilization came the War Department wanted more of everything than the country made or had. Instantly the War Department bought every pound of wool in the United States and bought every hide of leather. I went down into the basement of the War Department one day and could not get through the corridors of that vast building because they were piled to the ceiling with typewriters. I asked, "Whose are these?" and was told that they belonged to the adjutant general. I went to the adjutant general and asked him why he had bought so many typewriters, and how many he had bought, and he replied, "I bought every available typewriter in the United States." I then asked him why he bought them all, and he replied: "If I had not bought them the surgeon general would have; or if the surgeon general had not got them, the Navy Department would have got them, or the Treasury Department."

That is a very apt picture of what took place. Dozens of agencies connected with the War and Navy and Treasury Departments, foreseeing the expansion of their work needed more than there was in the country of many articles, entered the markets, and immediately there grew up competition between them, and competition between the various bureaus in the departments themselves, fierce competition and monopolistic buying. It became necessary to set up voluntary agencies which would divide the available supplies, apportion anticipated production, speed up existing factories, convert factories which were already in existence from one form of manufacture to another, and even build new factories for particular sorts of supplies. Then came the question, the Treasury Department having taken all the money there was in the country, of finding men who could get money to set up factories even when they had the knowledge and the need was manifest. So the War Department had to do one of the many illegal things which it was constantly the duty of the Secretary of War to do, to lend vast sums of public money to men who were willing to build factories and furnish supplies. It was no longer possible to ask for competitive bids and award formal contracts to the lowest and best bidders. Indeed, this problem at the outset was even worse than I have said, for many weeks elapsed after our declaration of war before Congress had appropriated a penny, and the Secretary of War not only had to lend money, but had to spend money which had not been appropriated and was not in the Treasury. This all seems very bewildering, I am sure. I remember very well I sent one day for the head of the department charged with the responsibility for seeing that expenditures were within lawful appropriations, and asked him the state of our balances. He told me that the department had unlawfully expended tens of millions.

It is interesting to remember that those who were marketing for the War Department under these conditions no longer could pick and choose, but rather had to create new sources of supply, and all of this had to be done without impairing the supplies upon which our allies were relying, for the French and the British, who were holding the western front, were relying upon us for food, clothes, arms and munitions. The battle was on with them; we were preparing to go into the battle. We could not go to the Bethlehem Steel Company and say to them, "Make guns of our model and type." Every facility that the Bethlehem Steel Company had was turning out guns for the British or the French, so that we had to set up new gun plants, starting from the very beginning and laying the foundations and constructing the machines which would fabricate these great cannon. Our preparation, therefore, had to be of a kind which diverted industry from normal into abnormal occupations. We had to train the mechanics who were to make the things we needed from men who had never before engaged in that form of work. This was true of the Shipping Board, the Navy Department, the War Department, and the picture it presents is of the necessity arising all of a sudden to take a country of one hundred and ten millions of people, redirect the energy of every man, woman and child, redirect their education, start anew with the training of hand and mind and ultimately bring out of it a cooperating whole which would not only produce an army which could fight, but would sustain that army under the most exacting conditions that the world has yet seen in war.

I am sure you realize there is nothing personal in the pride I take in what America did under those circumstances. The army that we sent to France won the war. I was there twice in 1918; first in March. I landed, if I recall it, about the middle of the month, and started to England to have some conferences with Mr. Lloyd George and the Earl of Derby, who was Secretary of War. It so happened that my journey, largely by automobile, took me along back of the line held by the British and the French. On the 21st of March I lunched in the middle of the day with General Pétain, the commander-in-chief of the French army. After I had gone into his headquarters and had lunch with him, he said to me, "Mr. Secretary, did you hear the sound of the guns as you came in?" I told him that I had not; that I had heard the big drive was on, but that perhaps the noise of my automobile had drowned the sound of the guns. "Well," he said, "come with me and listen." We walked out into the yard of the palace which had been the favorite residence of Napoleon III and Eugénie. Spring is earlier in France than it is here and I saw the wonderful garden of that serenely beautiful place. Early Spring flowers were up and birds were singing in the trees; but in the distance I heard, like the beat of a kettle-drum, the impact of innumerable sounds, incredibly rapid and insistent. As I listened I said: "Is that it?" and he said "Yes." Then I asked whether each impulse in that continuous roar was the sound of a separate gun, to which the General said: "Yes; and those are only our guns replying; the German guns are too far off for you to hear."

There were literally thousands of cannon speaking at once. I said to General Pétain: "I don't under-

stand, General, how you could sit calmly at the table with me, discussing supplies and reinforcements, and the campaign of next year, while that is going on." He shrugged his shoulders and smiled, saying, "Well, what would you have me do?" I said: "I do not know; but it does not seem to me that anybody ought to do anything else while that is going on but to attend to it." And then the General said: "Mr. Secretary, this is only the first day; this is the day of the division commander. Tomorrow will be the day of the corps commander; the next day of the army commander. Perhaps I shall have something to do on that day."

Then I left him, scheduled to stop at the headquarters of Sir Douglas Haig on my way to England that evening, and all along the line from that place to Haig's headquarters every mile or two a soldier would step out into the road and hold up his hands, stopping our car, and asking "Where are you going?" "We are going to such and such a town." "Well, you can't go through there; the Germans have that town"; and we were forced to sheer off toward the south, and keep sheering off to the south, to keep out of the way of the tremendous advance which the enemy was making. Finally, when I got to Haig's headquarters at seven o'clock that evening, the full measure of this awful attack was disclosed, and Marshal Haig showed me on maps in his room how the drive which had begun that morning had already pushed many miles into positions which the army had held.

For days after that I followed the advance on maps and saw how each day noted a deeper and deeper drive to the wedge, which threatened to separate the British and French armies until in fact there was nothing between the German army and the Channel ports. Just a little more, just a few more reserves, would have completely separated those armies, doubled the British back on the Channel and the French on Paris, cutting off the supplies of the British. A few days later, while the peril was still at its height, I asked Mr. Lloyd George: "Prime Minister, what would you do if the Germans took the Channel ports?" He looked at me a moment as though he had never entertained that idea before, and replied: "Why, that would change the whole character of the war."

General Pétain's forecast that perhaps by the third day he might have something to do was not borne out. On the very day when he said it to me he found it necessary to rush French divisions to assist in stemming the impetuous onslaught, and for many anxious weeks it was an open question whether the combined French and British armies would be equal to the task.

During this time I walked along a more easterly part of the line with Colonel de Chambrun, a distinguished officer of the French Army attached to General Pershing's headquarters. Colonel de Chambrun is a descendant of the Marquis de Lafayette. He pointed across the German lines to a little village nestling quietly there, and said to me: "That is St. Mihiel; that is my home. When this war broke out I had a house there and all my family's furniture was in it; but I do not suppose I will ever see my house again." The latter he said quite as a matter of course. I jestingly replied: "Well, Colonel, just as soon as the American Army is ready to make an independent offensive I will ask General Pershing to recapture the village of St. Mihiel and return your house to you." He smiled, but there was no hopefulness in his smile. That was in March.

In September I returned to France, and on landing in Brest met an urgent messenger from General Pershing, telling me to come at once to his headquarters. When I got there, General Pershing told me the first independent offensive of the American Army was to take place on the 12th of September, and he wanted me there to see the battle. When I was there in March there were three or four hundred thousand American soldiers training behind the lines, and a few of them occupying trenches in the so-called quiet sectors. Between March and September the three hundred thousand had grown to be two million, and they were no longer training back of the lines—they were holding their share of the front. In fact, there were more American soldiers in France at the time of the armistice than there were British soldiers in France—our little nucleus had grown until it was a vast and irresistible army, irresistible not in size only, but in its spirit of youthfulness, its strength, undiminished and unworn by the four years which had lowered the vitality and sapped the strength of the British and French forces.

The St. Mihiel salient tapered like a great triangle. At an earlier period of the war the French had made two or three frontal attacks upon it without success. General Pershing's plan was to pinch it off by attacks in the north on the eastern and western sides; and this was to constitute the first independent American offensive.

It was the 11th of September then, and I remember very well that the private car which General Pershing used as his headquarters was parked near the woods in order to screen it as much as might be from enemy airplanes that were constantly flying about overhead. We went to bed fairly early that night; perhaps ten o'clock. The battle was to begin at five in the morning. Every preparation had been made for it, General Pétain and General Pershing cooperating and the cooperation between General Pétain and General Pershing was most superb and perfect at every point then and before and after.

But at half-past four in the morning we were awakened, got up and then went outside to wait for the battle to begin. I suppose there are moments in every man's life which will always be supreme, things that time can not dim or obscure. If I close my eyes I can feel myself again standing just outside of that train with my associates, all of us holding our watches in our hands, realizing that the zero hour was five in the morning and counting the minutes as the watch ticked them off until it should be five. It gets to be five minutes of five, and everybody is so full of anxiety and tenseness that you can hear your heart beat, and you are wondering whether the noise you hear is your heart or the watch tick. You can not tell. It is dark all over the face of the earth, but just beginning to be streaked with dawn. Your watch tells you that it is four minutes, three minutes, two minutes; and then, as the second hand goes up to five o'clock away off in the distance, sounding like the crack of doom, so that your tense nerves almost scream with the release of the anxiety, one great booming gun is heard, and then two and three and four, ten, a hundred, until finally within the range of that thirty-five miles twenty-one hundred large bore cannon are pouring their shot and shell at one time over into the St. Mihiel salient; and then half an hour later the men are hurrying by you,

regiments of doughboys, racing as though they were out on a lark, singing and shouting as they go over the top off into the mist—for the morning grows misty, as I now recall it—and then as we ride along the front we see the great guns elevate their range by clockwork arrangement so that first a few yards, then twelve hundred, fifteen hundred, two thousand yards, they are falling, a curtain of shell with our boys following.

This kept up until about nine o'clock in the morning, and then there began to appear over the hills from every direction long lines of men in the uniform of the German army, streams of prisoners coming back, until by nightfall that day the whole St. Mihiel salient was in the possession of the American army and sixteen thousand German prisoners had been captured and great batches of munitions lay everywhere about.

Then I had an urgent message from General Pétain to join him and join the French and go into this little city of St. Mihiel, which had, because of its position upon the map, come to mean so much. We went into St. Mihiel and were greeted by the mayor, the city council, with silk hats on which they had put away four years before in the hope that some day they might wear them again; and on every house in that little village there were French flags. I said to an old peasant woman, "Where did you get the flags? Your city has been in German occupation for a long time." They all said: "Oh, Monsieur; we knew that the day of deliverance was coming sometime, and we had our flags where the Germans could not find them." They had found their flags.

A military band was sent in and played the martial airs, the victorious airs of France. The people danced and sang and wept in an ecstasy of gratitude I had never before seen and never again shall see, I suppose.

Then, after just a little of that, I went with De Chambrun to see his house. I said to him: "Do you know, I promised you that the American army would deliver your house back to you. Now, come and accept it from my hands." So we walked to the outskirts of that little village, and there was a house in a park, rather the worse for wear, both the park and the house, one end of it having been blown up as the last act of vandalism by the retreating Germans. We got to the front doors and then I let De Chambrun go in alone to view the wreck of his ancestral possessions. Perhaps half an hour later he joined me at the door, with a single picture in his hands, and with all the courtly grace and exquisite appreciation of circumstances and appropriateness which are characteritsic of the French, he bowed and said: "Mr. Secretary, the only picture left in my house which I recognize is a steel engraving of my ancestor, the Marquis de Lafayette, and, as his descendant, on this day when my house is redelivered to me by the American army, I can think of nothing so appropriate as to present it to the American Secretary of War." I have among my belongings, which the movers are still moving somewhere in the world, that picture, and it marks the fact that two million victorious Americans were changing the character of that war from the anxiety and desperate dangers of the 21st of March to the victories which began on the 12th of September and ended in complete triumph on the 11th of November.

All of this had to be fabricated out of very raw material. There is an old man in the War Department, a very fine old man bearing an honored name, John D. Randolph. He is an assistant chief clerk. I do not know how old he is, but when a boy he was in the office of the Secretary of War, when Edwin Stanton was Secretary of War, during the Civil War. I said to him one day: "Mr. Randolph, I have heard a great deal about Mr. Stanton's harshness of manner. Was he very harsh?" His eyes rather kindled at having his recollections revived on that subject, and he said, "Yes, Mr. Secretary; he was a very hard man. I saw him one day greet the delegation which came from the city of New York to protest against the enforcement of the draft in New York City." He described to me Stanton. Stanton would not sit down in his office because he thought if he did, somebody else might. He had a desk like a pulpit. It stood very high. On it he had a book like the ledger of fate. He was very near-sighted and he wore very thick glasses through which nobody else would see to tell whether he had any eyes or not. He stood back of this desk, facing the door through which people came in and, of course, the reputation of Stanton for asperity and harshness of manner so upset everybody who had occasion to go through his door that they came in all a-tremble. Stanton would stand there; the door would creak on its hinges and he would look up and say, "Well, who are you?" "I am John Jones, Mr. Secretary." "Who?" "John Jones." "What do you want?" "Well, I came to see if I could get my son pardoned." "Well, you can't." And out he would go.

I have not overdrawn it. The old gentleman said to me, "I very well remember that one man was so dissatisfied with Mr. Stanton's summary way of disposing of the situation that he went over and appealed to President Lincoln. Lincoln listened to what he said and then said, 'Yes, I think your boy ought to be let out. Go over and tell Stanton I think so.'

"The man went in, Stanton looked up and said, 'Who are you?' I have forgotten his name, but we will call him John Jones. 'I am John Jones, Mr. Stanton.' 'You were here before?' 'Yes, sir; but I have been to see the President since then, and he told me to come back and tell you that he thought my boy ought to be let out.' 'Well, he won't be. You go back and tell the President that he is a fool.'

"Taking it very literally, the complainant went back to the White House and saw Mr. Lincoln again. Mr. Lincoln asked him what had transpired and whether he had seen Stanton, and he replied that he had. 'What did he say?' 'I don't like to tell you.' 'Oh, yes; tell me.' 'He told me to go back and tell you that you were a fool.' Lincoln looked thoughtful for a moment and then said, 'Did Stanton say that?' 'Yes.' 'Well, he must be right; he nearly always is.'"

When Mr. Randolph told me the story he said he saw Mr. Stanton meet this delegation with regard to the draft in New York, and one of these New Yorkers said to Mr. Stanton: "Mr. Secretary, by what right do you enforce the draft in the City of New York, the city that has already contributed its full share to the armies of the Union. By what power do you do that?" Mr. Randolph said that Stanton looked at the speaker with a perfectly calm eye, and in a level but intensive voice said, "By arbitrary power, Sir; and you will be very fortunate if you get back to New York without the same power having seized you and thrust you in prison."

Tens of thousands of people—I have seen the number stated so high that I am afraid it is a misprint; I have seen the numbers stated at from ten thousand to two hundred thousand—but certainly tens of thou-

sands of people in the Civil War were arrested by the administrative process of Edwin M. Stanton. He had blanks piled high on his desk, and if anybody went in and said "John Jones in Middletown is a traitor," he would write: "John Jones of Middletown. Arrest him."

All that came under review by the Supreme Court of the United States in later decisions, and all of you who are familiar for any reason with the case in re Milligan will remember what the Supreme Court of the United States said about that sort of arrest and of trial by military commission, and the attitude of the Court toward the enforcement of these unusual war powers. I wrote down here what Mr. Justice Davis said in writing the majority opinion:

> During the late rebellion, the temper of the times did not allow that calmness of deliberation and discussion so necessary to a correct conclusion of a purely judicial question. Thus, while the war was on, considerations of safety were mingled with the exercise of power, and feelings and interests prevailed which now are happily terminated. Now the public safety is assured, and this question, as well as all others, can be discussed and decided without passion or the admixture of any element not required to form a legal judgment.

So, in in re Milligan, they decided that the action of the military commission which tried civilians by military process was all unconstitutional and void, and that all of those people were to be restored to their rights.

Therefore, when we went into the war we had merely the fact that in the Civil War this extension of the executive power under the guise of war power had been used extensively and had already been declared to be usurpation of power by the Federal Supreme Court, and so we had very little comfort for adopting any of the same processes. It was a lawyer's job. It required the training of a lawyer, the outlook of a lawyer, and there were gathered around the Secretary's office a very large number of tremendously capable lawyers, so that it was very easy to assume the responsibility for many violations of law which were necessary.

Weeks after we went into the war not a single measure had been passed to provide a dollar of additional money for war preparation. Six weeks, I think, was the time before the first appropriation. Just before it was passed I sent for the Quartermaster General and asked him how much he had spent illegally. He told me he had spent three hundred million dollars. I decided that it was impossible to put anybody in jail for spending three hundred million dollars. You can put a man in jail for spending five dollars or fifty dollars, but three hundred million dollars passes anybody's sense of humor or propriety, and from that time on the administrative process did not suddenly, out of hand, arrest and imprison citizens, but with the counsel and advice of lawyers who were not merely technical adherents of their profession the necessary steps were taken, and it resulted in the expeditious mobilization of our effective forces which I have described before.

Now, just a word about what I suppose the War Department means to you as lawyers. I suppose the things that you have heard most about are the administration of military justice, the conscientious objectors, and war contracts.

It is true that very heavy sentences were imposed for military offenses upon very large numbers of men. They were imposed by courts martial made up almost entirely of men drawn from civil life. The number of officers in the Army of the United States, in the Regular Army, when we went into the war, was something like eight or nine thousand. At the conclusion of the armistice the number was two hundred and seven thousand officers, so that almost all of the courts martial were largely composed of men drawn from civil life. They imposed the sentences, and some of them seemed very long and cruel. The Judge Advocate General and I talked about that a number of times, and we decided that the volume of cases was too great for current review, but that we would review them all and equalize them and moderate them just as soon as the agencies could be set up for that purpose.

We set up in Paris an independent branch of the Judge Advocate General's office, and when the hubbub arose about it about half of those sentences had been cut down substantially to peace-time proportions. There never was on anybody's part an intention that a man should serve two or three times his natural life for any offense. But this is true: The Army of the United States in this war is the only army that ever engaged in active military operations on an extensive scale of which it can be said that not a single soldier was executed for a purely military offense. Not one! In the armies of our allies—and you will excuse me from particularizing—it was not an uncommon thing for men to be shot on the spot by officers who, without arrest or trial, adjudged them guilty of cowardice in the face of the enemy. Sometimes when a shell dropped in a group of men they would be blinded and stupefied by the noise and the terror of it, and they would scatter in all directions. Those who ran towards the rear were shot for cowardice, while those who fled forward, equally blind to what they were doing, were decorated for gallantry.

In the Army of thhe United States there were not many capital penalties imposed. A merciful consideration dared to feel that the flower of American youth did not need to be stimulated by terrorism, and that we could safely reserve those executions until a calmer time and, if possible, entirely commute them. So we came out of the war, and I take immense delight and pride in it, without a single capital punishment inflicted for a military reason.

As a matter of fact, a year and a half after the war was over there were fewer men in the military prisons of the United States, in spite of the fact that we had had four million men in arms, and with all the civil offenses which would be natural to be expected in so large a number—a year and a half after the war was over we had fewer men in military prisons of the country than we had before we went into the war. So that the cruel and oppressive sentence which was so much in the public eye at one time was moderated and peace-time penalties only imposed.

The conscientious objectors were one of the puzzles of the Secretary of War. Altogether there were about twenty thousand men who notified their draft boards that they had conscientious scruples about fighting. Some of them died in battle; some of them performed heroic service as nurses and stretcher bearers on bloody fields; some of them spent time and labor and devotion nursing the sick in hospitals; some of them are still busy reconstructing the shattered homes of expatriated French peasants, and trying to restore the life that once was in No Man's Land. Out of the total twenty thousand, five hundred and five or five hundred and six of them proved finally obstinate, so

obstinate that they had to be tried. They were the queerest assortment of people that anybody ever saw. Some of them objected to any war; some of them objected to this war; some of them did not object to war so much as they objected to doing anything they were told. I used to interview them by groups. I asked one of them, a solemn and serious looking man, why he objected to going to war, and he said with perfect assurance, "I am a brother of God." I told him that we hoped devoutly God was on our side, and we were perfectly willing to have that include members of the family. But it made no impression on him.

Of these five hundred men some were defectives; some of them just on the border line of insanity; some of them born in this country of yours and mine in such remote circumstances and so isolated and separated from the contacts that make up life to us that they had no real comprehension of what the country was about, much less the war. Some of them were lying in wait behind the garden gate of their home to shoot at the sheriff if he happened to come to get them with a warrant from the draft board, thinking that he was after them for illicit distilling. All shades and phases of opinions. The net result was that only about five hundred of them really were sentenced to any sort of punishment, and after the war was over and they had served about the same length of time that the civil courts were sentencing men to for failure to report when ordered by their draft boards and failing to serve the country entirely, why, they were let go.

Then came the real opportunity for the lawyers to serve. When the armistice came, suddenly, there were twenty-eight thousand contracts between the War Department and the business men of this country in process of execution, presenting the most intricate and difficult conditions for adjustment. Organizations of lawyers were formed. The glory of the war was over; the time when men felt that they were sacrificing their time to serve their country had passed, and yet these men from all over this country, lawyers of distinction and lawyers of great earning power, were summoned to Washington and told, "Here are twenty-eight thousand contracts involving practically every business and every industry in America. The thing that these industries need is to get the money the Government owes them, so that they can start out in their civilian production again; and what the Government needs is not so much a meticulous and accurate settlement with them as a just and speedy settlement. I want great numbers of lawyers to settle these contracts, settle them speedily and close up this thing which, if allowed to continue, will be a drag on the business of the country."

Within two years after the armistice, almost all of those contracts had been settled and had been settled to the satisfaction of the business of the country. It gives me great delight to be able to say that in all that vast and intricate undertaking it was so rare a thing that I do not now recall an instance of finding a business or a business man who really was seeking to take an unjust advantage of his Government by reason of these contracts. We found men who disagreed with the Government as to the real measure of their loss, but I do not now recall an instance where I believed that business men were seeking an unjust advantage of their Government. It was a finely patriotic thing.

I have tried to describe to you in a running and desultory way what went on in Washington as seen by a lawyer. But what is to go on? What is going on from now? May I ask you to think of that for a moment? We lawyers are, after all, the fabricators of institutions, and we are going to have to build the institutional civilization which is to come now into the world. What is it going to be like?

Societies are all the time trying to build fences around themselves to keep out new ideas. If every new idea that anybody suggested was put into practice at once, most of them would fail. They must be seasoned, they must be tried out before they can be adopted; and so the tendency of every society and civilization is to become impervious to new ideas and to surround itself with a protecting medium so that new ideas begin to accumulate on the outside and clamor for admission. When the number of new ideas on the outside gets sufficiently great, and the lack of adaptation of the institutional garment to the society in its then state of development becomes too pronounced, we have either a rebellion or a revolution. A rebellion is an attempt, ordinarily, to get back to day before yesterday, where things seem to have been better than they are now. A revolution is usually an attempt to get over suddenly into the day after tomorrow, where it is hoped things will be better. In the history of the world there have been great epochs when the mind of man was troubled, when everything which was secure and stable has been uprooted, and out of which new ideas have come which now seem so normal to us that we forget that they were not always so regarded. It seems to me we face just such an era as that now.

Take the Code of Justinian, for instance. We lawyers know about that. Justinian ordered Tribonian to write what we call his code. He got a hundred lawyers and put them in a room and said: "Codify the law of Rome," and they wrote the Corpus Juris Civilis, which was the last will and testament of the Roman Empire as it died, handing down to mankind the only really permanent thing that Rome did. When that Code was being written the western throne of the Roman Empire—it was divided into two then—was occupied by a succession of degenerates, whose presence on the throne was tolerated by barbarian kings; while the eastern throne in Constantinople was occupied by men who were the product of what Rome had once been, with principles characteristic of Cyrus and Darius, probably, but whose very demeanor and surroundings were proof that the era that called them emperors was dead. All over the world the civilization which Rome had taken up from Greece was departing, and new things were coming. The barbarians were bringing down ideas from the northern forests. The people once held in subjection were becoming the conquerors of Rome, and out of that vast upheaval of institutions the world solidified, as much as was preservable, into the Justinian Code, and to this hour the major part of the civilized world is governed by that code of laws. Some of our States, Louisiana and Texas, in part, are governed by it. Even the Empire of Japan, when it became a civilized and modern state, sent a group of Japanese lawyers to Paris to study the Code Napoleon, which was a derivative of the Justinian Code; and almost all the civilized world—practically the only exceptions are England and English possessions and the United States—are governed by the thing that solidified and rose out of that great upheaval of the human

spirit in the fourth and fifth centuries of the present era and took form as the Code of Justinian.

Then we can move along to another epoch with which we are even more familiar—the battlefield at Runnymede. When King John was defeated by the barons, the thing which was defeated was not John, but king. The barons and the people of England had united; they thrust John aside and forced him on the battlefield to sign Magna Charta, which for the first time in the institutional history of mankind gave certain fundamental, constitutional rights to men.

We come along the way to the two great revolutions, the French and our own. I think sometimes that we do not draw the distinction between those two which ought to be drawn. They happened at pretty nearly the same time, but they were very different, and for very different objects. The French Revolution was to establish the rights of man as such. The American Revolution had nothing to do with man, but it was to establish the right—perhaps it would not be improper to say that it was the first and prophetic application of the principle of self-determination of peoples. We were fighting in our revolution for political independence, the right of self-determination on the part of a people resident in a natural boundary; while the French, of course, were fighting for the rights of man, irrespective of natural boundaries. But the whole world was in a ferment, and the French Revolution was only one manifestation of that spirit of liberty which still remains not only inscribed on their buildings in Paris, but in every heart in France, and which is inscribed in our great Declaration of Independence, the foundation of constitutional government as we have known it and lived under it for many years.

Now the world is in another ferment. The firm foundation upon which we used to think we stood in building this great institutional civilization of ours is shaken. We don't know what is left, and men despair everywhere of being able to rebuild the civilization as it was. It is a new order and a new day. Instead of being agricultural and agrarian as we were fifty or seventy-five years ago, we are now an intensely industrial people, and we see strugglings toward new forms of industrial organization, like the soviet establishment in Russia, for instance; manifestly a proof that the human spirit is in the state of flux again. It is grouping around a new set of relations which have grown up among men by reason of the changed conditions which modern times have brought about. There is to be a recast in the future of this industrial civilization, and in it we lawyers have a very keen interest, for if we do not give a right direction to this broken and striving human spirit, who will?

Here we are in America, the one unbroken country in the world. Our wealth is untouched; only a few of our lives have been taken away. Our children are born, educated and matured and nurtured with as much care and as much comfort as ever, while all the rest of the world is lying prostrate, its children underfed, disease is spreading rampant among its peoples, old and young; their minds in despair as to their institutions. Something has to be done to adjust life on this planet to the change which has come about by reason of the modern industrial form which civilization necessarily has taken. As lawyers, let us shut our minds to any tendency to despair or pessimism. Let us teach our fellows and our fellow advocates to keep a firm hold upon those principles which we as lawyers learned in our first law lesson: that a sound civilization rests upon order; that order rests upon potential force; that no nation can live to itself in the world, but is tied by fate and destiny to the welfare of all nations; that if we are going to be happy in this world the world in the long run must be happy with us. Having the one unbroken country, having the untouched resources, having the traditions of self-government, having a position of natural leadership on which other broken peoples instinctively rely with confidence that we will lead, it is America's duty to lead in the organization and reorganization both of the industrial forces and the institutional readjustments which are necessary to adopt in order that we may be in harmony with the conditions of modern life.

Fifty years from now there either will be or will not be another and worse calamity than the one we have just gone through. If another comes, it will be worse than this. The destructive force of the next war is a thing that an informed man shudders to think about. It either will be or will not be. I almost hesitate to say how completely I believe that the answer to that question as to whether it shall or shall not be rests with the American lawyers. Let us assert the leadership which our experience and our knowledge give us and make us responsible for. Let the American lawyer lead these constructive forces.

That Elastic Constitution

The rubber in the Constitution of the United States has been stretched almost to the breaking point in many recent decisions. The fear that a Constitution formed one hundred and fifty years ago would be too rigid for future generations is wholly without foundation. This wonderful instrument has a marvelous elasticity which, without the necessity of much further amendment, will doubtless be able to accommodate itself to all future changes demanded by a "preponderant public opinion," to quote Mr. Justice Holmes, to whom without doubt goes the chief distinction of "liberalizing" the Constitution. The latest effort of this learned Justice in adjusting the Constitution to modern conditions is to be found in his opinion in the recent Rent Commission case—Block v. Hirsh (decided April 18, 1921).—Central Law Journal.

Philosophy and Low Prices

In the South, because the price of cotton has dropped from 40 cents to 10 cents, we think that we are the greatest sufferers; but we should remind ourselves that wheat has fallen from $3.59 to $1.05, corn from $1.70 to 55 cents, oats from 96 cents to 35 cents, and wool from 80 cents to 10 cents with no market at that price. As soon as the retail price of finished products reaches the low levels, the readjustment necessary to normal conditions will have been completed. Then those who have lost heavily must not overlook the gains which they enjoyed a few years ago when prices were climbing. If those big gains have been spent and unwise debts contracted, let every man blame himself for his extravagance and lack of foresight. Those who dance must pay the fiddler.—Arkansas Methodist (Little Rock, Ark.)

WILLIAM HOWARD TAFT

CHIEF JUSTICE UNITED STATES SUPREME COURT

CHIEF JUSTICE WILLIAM HOWARD TAFT

By J. M. DICKINSON
Former Secretary of War and Member of the Chicago Bar

A RARE opportunity came to the President and he availed himself most wisely of it in appointing former President Taft to the chief Justiceship of the United States. Never before have these two great offices been held by the same man and never before has the combination arisen where a President could have made such an appointment. It required the existence of an ex-President of a fitting age with the experience and learning commensurate with that high place, of one who in and out of office had sustained a character that commanded the confidence of the country, and then a vacancy which has occurred but rarely in our history. That President Harding is fully sustained in his judgment is shown by the concurrent and wide approval of the lawyers and people at large, and the commendation of the press without regard to party affiliation.

Mr. Taft has not only the confidence of the people of America, but they entertain for him an affection not accorded to any other living man. He probably is known personally by more people than any man in the United States. The sentiments entertained for him are not to be wondered at when his career is reviewed. Shortly after a most brilliant career at Yale he became a Judge in Cincinnati, and was successively Solicitor General of the United States, the presiding judge for many years of the Circuit Court of Appeals of the Sixth Circuit, Governor General of the Philippines, Secretary of War and the President of the United States. In this stately walk in life there was no faltering, no aberrations, nothing that brought in question his integrity, justice, courage or fidelity to duty. There is no reason for apology, explanation or regret.

Perhaps nothing so exalted him in the admiration and established him in the esteem of the people as his courageous and patriotic support of a not too friendly administration throughout the war. His voice was always heard whenever there was need for rallying public sentiment to patriotic effort. He never criticized, nor was he ever lukewarm. Throughout the length and breadth of this land he went and was constantly proclaiming patriotic principles.

That he will crown his career by being a great Chief Justice cannot be doubted, for his qualities have been too often proven to admit of question. The lawyers who appeared before him in the Sixth Circuit know that he was always considerate, patient and efficient as a presiding judge, and that his decisions were learned, fearless and always impersonal.

His appointment has been recognized abroad as a most happy one, giving confidence and assurance in respect of international questions that may come before that high tribunal.

The fact that some senators opposed his confirmation will not disturb but rather confirm the equanimity of the public mind. The differences between him and them were so antipodal that their approval would have raised a serious doubt whether or not his character had in some way not been rightly estimated.

Biographical

William Howard Taft, the present Chief Justice, has been so much in the public eye that biographical details seem almost superfluous. He had a wide and varied career in affairs before coming to that exalted position.

He was born Sept. 15, 1857, at Cincinnati, O. He received his collegiate education at Yale, where he was graduated in 1878, ranking second in a class of 121 members in point of scholarship. He studied law at the Cincinnati Law School, completing the course in 1880. He did not at once enter the practice, however, but worked for a time as law reporter on the Cincinnati Times and later on the Commercial.

In the early part of his career he was Assistant Prosecuting Attorney of Hamilton County, Ohio, and in 1882-3 Collector of Internal Revenue. He was Judge of the Superior Court of Ohio (1887-90), and during the latter year was appointed United States Solicitor General by President Harrison. His arguments in the Bering Sea cases (in Re Cooper, 138 U. S. 404; 143 U. S. 472) and various other important causes brought him a national reputation. In 1892 he was appointed Judge of the Circuit Court of Appeals for the Sixth Circuit, resigning that position in 1900 to become Chairman of the Commission appointed by President McKinley to institute civil government in the Philippine Islands.

During the period of his Philippine service the foundations of civil government were laid, education was encouraged, and sanitation did much to combat the disease problem. In 1902 he visited Rome and negotiated for the purchase of the Friars' lands, which were subsequently sold to tenants and the inhabitants at reasonable rates. In 1904 he succeeded Elihu Root as Secretary of War in President Roosevelt's cabinet, bringing to that position his newly acquired and valuable experience in insular affairs. In 1906, after the intervention of the United States in Cuba in that year, it was natural that he should be sent there on a temporary mission as Governor. In 1907 he visited the Canal Zone in order to familiarize himself with its problems. Later he went to Japan for a conference about the problem of the Japanese in the United States and succeeded in making an arrangement acceptable for a time. He next visited China on important negotiations relating to the Chinese boycott of American goods, and then went to Russia. In 1908 he was elected President, and in 1913 became Kent Professor of Law at Yale University and in the same year President of the American Bar Association.

His recent career has been hardly less full of activities of a public character than was his long and varied official life. He has appeared frequently in print and on the platform during the last few years in discussions of important public questions. The very active and patriotic part he played during the critical pre-war and war period is familiar to all. The realization of what has been generally regarded as his life's ambition came with the appointment to the Chief Justiceship.

CHIEF JUSTICES OF THE UNITED STATES

By W. O. Hart

Of the New Orleans (La.) Bar

THERE have been ten Chief Justices of the United States, John Jay, of New York, (1789-1795); John Rutledge, of South Carolina, (1795); Oliver Ellsworth, of Connecticut, (1796-1801); John Marshall, of Virginia, (1801-1835); Roger B. Taney, of Maryland, (1836-1864); Salmon P. Chase, of Ohio, (1864-1873); Morrison R. Waite, of Ohio, (1874-1888); Melville W. Fuller, of Illinois, (1888-1910); Edward Douglass White, of Louisiana, (1910-1921) and William Howard Taft, who took the oath of office on July 11, 1921.

Jay, Rutledge and Ellsworth were appointed by Washington, Marshall by John Adams, Taney by Jackson, Chase by Lincoln, Waite by Grant, Fuller by Cleveland, White by Taft, and Taft by Harding. It will be noted that of the ten four have been from the South—Rutledge, Marshall, Taney and White—and three from the State of Office-holders, Ohio, though neither Chase nor Waite was a native of that state.

Jay, Rutledge, Ellsworth, Marshall, Taney, White and Taft were all natives of the States from which they were appointed.

Although there have been (including Harding) twenty-seven Presidents, but eight have had the honor of appointing a Chief Justice of the United States.

Washington, Lincoln and Grant at their second inaugurations had the unique distinction of having the oath of office administered to them by Chief Justices whom they had appointed.

All of the Chief Justices except Rutledge had the honor of officiating at the inaugurations of one or more Presidents. John Jay at the second inauguration of Washington; Ellsworth at the inauguration of John Adams; Marshall at the two inaugurations of Jefferson, Madison, Monroe and Jackson, and at the inauguration of John Quincy Adams; Taney at the inaugurations of Van Buren, William Henry Harrison, Polk, Taylor, Pierce, Buchanan and the first inauguration of Lincoln; Chase at the second inauguration of Lincoln and both inaugurations of Grant; Waite at the inaugurations of Hayes, Garfield and the first inauguration of Cleveland; Fuller at the inauguration of Benjamin Harrison, the second inauguration of Cleveland, both inaugurations of McKinley, the inaugurations of Roosevelt and Taft; and White at the two inaugurations of Wilson and that of Harding.

Jay was a member of the Continental Congress and of the Constitutional Convention of New York, where on his motion on July 9th, 1776, the Declaration of Independence was approved by his State. He was Chief Justice of New York, President of Congress, Minister to Spain, one of the signers of the Treaty of Peace after the Revolutionary War, and was appointed Secretary of Foreign Affairs July, 1784. He was defeated for Governor of New York in 1792 but afterwards elected, serving six years, from 1795 to 1801. He resigned as Chief Justice to become Special Envoy to Great Britain and was reappointed by President John Adams in 1801, but declined the appointment.

Rutledge was a member of the Continental Congress and of the Provisional Congress which preceded it. Was President of South Carolina, then Governor, and then Chancellor; member of the Convention that adopted the Federal Constitution and of the State Convention of South Carolina which ratified the Constitution; was Associate Justice of the Supreme Court of the United States, (1789-91) resigning to become Chief Justice of South Carolina; (1791-95). He was appointed Chief Justice of the Supreme Court of the United States, during the recess of the Senate to hold office until the end of the next succeeding session. When the Senate reconvened they refused to confirm his appointment, either because of his opposition to and criticism of the Jay treaty, or because of his failing health. The former is the reason given by his contemporaries. Rutledge and White were the only Associate Justices of the Supreme Court of the United States to become Chief Justices, though the former was not a member of the Court at the time of his appointment.

Oliver Ellsworth was a member of the Continental Congress and of the Senate of the United States and a member of the Supreme Court of Connecticut. While Chief Justice he was appointed Minister to France, remaining in Europe for about two years, resigning from the Court in 1800, thus being the second Chief Justice to resign.

John Marshall, the expounder of the Constitution, was a member of Congress from Virginia and delivered the Memorial Address on Washington after his death, wherein he used the famous phrase: "First in war, first in peace, and first in the hearts of his country," not "fellow-citizens" or "fellow-countrymen" as the expression is often quoted. He served in the Revolutionary War, in the Virginia House of Burgesses, and as a member of the Convention which ratified the Constitution for Virginia. He declined the office of Attorney-General, but was appointed by Washington Special Commissioner to France. President Adams appointed him as Associate Justice of the Supreme Court, September 26, 1798, but he declined the appointment. He was appointed Secretary of War by President Adams and did not accept but became Secretary of State on May 12, 1800, holding that office until the expiration of the term of President Adams, though he took his oath of office as Chief Justice on February 4, 1801. He served on the Court for thirty-four years, five months and two days.

Taney was Attorney-General in the Cabinet of Jackson from July 20, 1831, to November 18, 1833, and was rejected in January 1835 by the Senate when appointed by Jackson Associate Justice of the Supreme Court; but upon his appointment as Chief Justice he was confirmed in December of the same year.

Chase was a native of New Hampshire; was first elected Governor of Ohio as a Democrat and then as a Republican, before and after which he was a member of the Senate of the United States. He was Secretary of the Treasury under President Lincoln, and was the father of the "Greenback," which saved the credit of the United States during the war between the States. He presided at the impeachment trial of President

Johnson with dignity and impartiality though most of his rulings, when in favor of the President, were overruled by the Republican majority in the Senate. He was a candidate for the Republican nomination before the Convention in 1860 and in 1868 was frequently mentioned as a probable Democratic candidate, but Samuel J. Tilden of New York stampeded the convention and secured the nomination of Horatio Seymour, also of New York.

Waite, who was a native of Connecticut, was one of the noted lawyers of the United States. He was a member of the Legislature of Ohio; President of the Constitutional Convention of that State in 1874; and represented his country in the Alabama Claims Arbitration at Geneva.

Fuller was a native of Maine, and thus the fourth Chief Justice born in New England. At the time of the death of Waite the Senate of the United States consisted of thirty-seven Democrats and thirty-nine Republicans. Party spirit was running very high, two Republican votes were necessary to confirm the nomination and the two Senators from Illinois, Cullom and Farwell, furnished the votes.

Chief Justice White was a soldier in the Confederate Army in the War between the States and was taken prisoner at the fall of Port Hudson, Louisiana, in 1863. As a Confederate Veteran he marched in the parade at the great Reunion in Washington in 1917. He was a member of the State Senate of Louisiana. Associate Justice of its Supreme Court, Chairman of the Board of Examiners for admission to the bar, one of the leaders in the great Anti-Lottery Campaign, member of the first Board of Administrators of Tulane University, New Orleans, and a member of the United States Senate when appointed Associate Justice of the Supreme Court of the United States.

THE FUNDAMENTAL UNSOUNDNESS OF THE KANSAS INDUSTRIAL COURT LAW

Argument That It Denies the Equal Protection of the Laws Guaranteed by Fourteenth Amendment and Seeks to Set Up a Novel Theory of the Police Power

By JOHN S. DEAN
Of the Topeka (Kan.), Bar

IT IS in view of the fundamental principles of the American system of government that the Kansas Industrial Court law must be judged. While there are some provisions of the act which come within the constitutional exercise of the police power of the state, and are therefore subject to criticism only from the standpoint of sound public policy, the main features of the law contravene the most elementary principles of individual liberty and private property.

It should be noted that the provisions of this so-called industrial code apply only to the public utilities of the state and three selected private industries. The industries affected are manufacturers of clothing, manufacturers of foodstuffs and producers of fuel. Over these industries and the workmen engaged therein the Court of Industrial Relations assumes to exercise a paternalistic and managerial jurisdiction.

The operations of these industries are by this law "determined and declared to be affected with a public interest and therefore subject to *supervision* by the state as herein provided for the purpose of preserving the public peace, protecting the public health, preventing industrial strife, disorder and waste, and securing regular and orderly conduct of the businesses directly affecting the living conditions of the people of this state and in the promotion of the general welfare." Another provision of the law reads as follows:

> It is hereby declared and determined to be necessary for the public peace, health and general welfare of the people of this state that the industries, employments, . . . herein specified shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and security, *and be supplied with the necessaries of life.*

It has been said by apologists for this law that the jurisdiction of the Industrial Court can only be invoked in cases of emergency. This claim, however, is untenable. The jurisdiction of the Court attaches "in case of a controversy arising between employers and workers, or between groups or crafts of workers, engaged in any of said industries . . . if it shall appear to said Court of Industrial Relations that said controversy may endanger the *continuity* or *efficiency* of service of any of said industries . . . *or* produce industrial strife, disorder or waste, *or* endanger the orderly operation of such industries . . . and thereby endanger the public peace or threaten the public health."

Since every controversy between employers and workers, as proven by universal experience, "may endanger the continuity or efficiency of service" of an industry, and since it is specifically provided in the law that it is "necessary for the public peace, health and general welfare of the people of this state that the industries . . . shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and comfort," it will be seen that the claimed emergency will embrace practically every dispute between employers and employes relative to wages and working conditions. It is needless to say that these circumstances, which by the law authorize the interposition of the Industrial Court, do not constitute such an imminent public calamity as the courts have held sufficient to justify an exercise of the extraordinary powers of government. Moreover, it is further provided, "if, during the *continuance* of any such employment, the terms or conditions of any such contract or agreement hereafter entered into, are by said court, in any action or proceedings properly before it under the provisions of this act, found to be *unfair*, unjust or unreasonable, said Court of Industrial Relations may by proper order so modify the terms and conditions thereof so that they will be and *remain fair*, just and reason-

able and all such orders shall be enforced as in this act provided."

All the references in the law to the public health, peace, comfort and general welfare, as well as the claim of "emergency," are mere camouflage used for the purpose of concealing the real character of the legislation, which seeks to establish managerial supervision, regulation and control by the public of these private industries.

It is claimed that economic changes, modern progress, etc., have impressed these private industries with a "public interest," and it is declared in Section 6 of the Act that it is "necessary for the public peace, health and general welfare of the people of this state that the industries . . . herein specified shall be operated with reasonable continuity and efficiency in order that the people of this state may live in peace and security, *and be supplied with the necessaries of life.*" Since when has it become the function of the state to provide its citizens with the necessaries of life? Are foodstuffs, clothing and fuel necessaries of life to any greater extent now than they have always been? Since when and by what particular change or improvement in our economic system has the interest of the public in the production and manufacture of the necessaries of life been enhanced? The answers to these questions are obvious. None but a purely paternalistic government undertakes to provide its citizens with the necessaries of life. Food, clothing and fuel are no more necessary for the public health and welfare now than they have always been. The interest of the public in the manufacture and production of the necessaries of life has not been affected one whit by any industrial or economic change in our domestic or national life.

Production and manufacture are fundamentally and unchangeably private business. The right to engage his property and his services in these business activities, and to control and manage the same according to his own judgment; to exercise the most perfect freedom in contracts connected therewith; to hire and discharge; to engage one's services or refuse employment; to operate or suspend operations as his own best judgment may dictate are among the inalienable rights of all American citizens. No legislature under any pretext whatever can limit, modify or regulate the freedom of citizens in this respect—save in the strict exercise of the police power operating under the maxim, "So use your own as not to injure another." It is of the very genius of the American system of government that production and manufacture shall be left to the individual initiative and management of private citizens, unhindered and free from the embarrassments of state interference. The unexampled abundance with which the "necessaries of life" have been supplied to the people during the century and a half of our national existence sufficiently demonstrates the wisdom of the constitutional policy of non-interference by the state in the private business affairs of its citizens.

Sometimes combinations of producers or manufacturers have been effected for the purpose of enhancing prices, restricting the amount of production, etc. These combinations have been promptly dealt with by the Government under the exercise of its undoubted police power through the enactment of laws against monopolies, combinations in restraint of trade and commerce, etc., all of which laws find their justification in the maxim, "So use your own as not to injure another."

It is also true that combinations of workmen have been effected for the purpose of improving working conditions and increasing the standard of wages, and that incidentally these combinations of workmen, as a result of strikes and violence, have interfered with production, and often restricted and embarrassed trade and commerce.

The latter kind of combinations have not been made the subject of statutory prohibition, because their real object, to wit: the improvement of working conditions and increase of wages, is entirely lawful and commendable. It is only through the unlawful acts of such combinations of workmen in trespassing upon the property of their employers, committing waste, and violently preventing others from working under conditions and for wages which they are not willing to accept for themselves, that their activities have interfered with the continuous operation of industry, and seriously affected production, thus indirectly putting a restraint upon trade and commerce. In so far as the Kansas Industrial Court law seeks to prevent and to punish such unlawful conduct by combinations of workingmen, it has had the effect of subjecting them to the same legal restraints and the same penalties as those to which the illegal combination of employers have long been subjected. Certainly no one can claim that the law in this respect is either unjust or unconstitutional. It is simply exercising the same police power over illegal combinations of laborers that it has for many years been exercising over illegal combinations of employers. It simply says to workmen, "use your own (i. e. freedom of action) so as not to injure others," precisely as it said long ago to the employer, "Use your own (i. e. private property employed in production or manufacture) so as not to injure others."

The scope and extent of the supervision which may be exercised by the Industrial Court over the three selected industries is best illustrated by the provisions of an order, or judgment, recently made in a case brought by the officers of Local Union No. 176 of the Amalgamated Meat Cutters and Butchers Workmen of North America vs. the Charles Wolff Packing Company. The defendant is a small meat packing company employing about four hundred workmen. It had an agreement with its employes "in the nature of a collective bargain," which expired on January 1, 1921. The company and its old employes were unable to agree upon a scale of wages, and upon certain other matters connected with the employment. Thereupon a complaint was filed by the employes' organization against the defendant industry and an investigation and trial was had before the Industrial Court, and although the employer asserted his ability to secure other workers upon terms and conditions mutually satisfactory, an order was made for the future regulation and control of the defendant industry, and the employment of the complainants therein. It will suffice to mention a few of the regulations imposed upon the industry by the court.

1. A basic working day of eight hours is established.

2. The industry is required to furnish sufficient work "to the regular employes in each and every month so that the monthly earnings of regular work-

ers will be sufficient to constitute a fair wage under the Kansas industrial law."

3. Women workers shall receive the same wages as men.

4. Piece-work rates to be paid in accordance with piece-work schedule set out in the order.

5. Work performed on Sunday and legal holidays to be paid for at the rate of time and one-half.

6. A temporary order fixing the minimum wages of employes, as of the date of the expiration of their contract on January 1, 1921, was approved as reasonable and fair, and the company was ordered to comply with the same, and pay the wages so temporarily fixed by the court.

7. A minimum schedule of wages was fixed to be in force from May 2, 1921.

8. Other burdensome conditions and regulations for the control and management of the defendant's property are to be found in the order *ad nauseam*.

The complainants prayed that "the court make an order fixing a fair and reasonable wage for the complainants, and authorizing *and compelling* the defendant to enter into a contract for the continuance of service of its employes at such fair and reasonable rates." The order of the court in pursuance of this prayer reads as follows:

> The following is a fair and reasonable schedule of minimum wages to be paid by the respondent company to its respective employees, *effective May 2, 1921.*

The enforcement of this order is provided for in Sec. 18, which reads:

> Any person wilfully violating the provisions of this act, or any valid order of said Court of Industrial Relations, shall be deemed guilty of a misdemeanor, and upon conviction thereof in any court of competent jurisdiction of this state shall be punished by a fine of not to exceed $1,000, or by imprisonment in the county jail for a period of not to exceed one year, or by both such fine and imprisonment.

The industries brought within the jurisdiction of the Industrial Court by the provisions of this law are very numerous. They include flour mills, cereal factories, butchers, bakers, poultry and meat packers, tailors, shirt factories, millinery establishments, overall factories, manufacturers of boots and shoes, hosiery and underwear, coal operators, coke and brickette producers, oil refiners, producers of crude oil and natural and artificial gas for use as fuel—in short, all persons and corporations engaged in the manufacture of wearing apparel, foodstuffs of every kind and in the production of all kinds of fuel. They constitute a very considerable and important part of the industrial community. They are engaged in private business. The land, buildings, machinery, equipment and money used by them in the transaction of their several businesses is private property. The workmen employed in these industries are following their private avocations.

No one would doubt for a moment but that the provisions of this law violate the fundamental rights of the owners of, and workers in, these industries so long as they are considered private. That a commission located at the seat of government could exercise such a managerial supervision over the vast private interests and activities of a state is, of course, inconsistent with the constitutional guarantees in favor of personal liberty and private property. Nowhere has this principle been more clearly stated than by the Supreme Court of Kansas:

> The business conducted by the defendant was its property, and in the exercise of this ownership it is protected by the constitution. It could abandon or discontinue its operation at pleasure. It had the right, beyond the possibility of legislative interference, to make any contract with reference thereto not in violation of law. In the operation of its property it may employ such persons as are desirable, and discharge, without reason, those who are undesirable. It is at liberty to contract for the services of persons in any manner that is satisfactory to both. No legislative restrictions can be imposed upon the lawful exercise of these rights. (Brick Co. vs. Perry, 69 Kan. 300, 301.)

In order to obviate this apparently insuperable obstacle, the framers of this law resorted to the expedient of declaring that the industries involved were "invested with a public interest." This expression is borrowed from the opinion of the Supreme Court of the United States in Munn v. Illinois (94 U. S. 113). I think it must be conceded that the decision in that case, as modified by subsequent cases in the same court, has become the settled law of this country, but it does not furnish any sanction for legislation of this character. Property "invested with a public interest" is still *private* property, and within the protection of constitutional guarantee. Even property "devoted to a public use" and utilized in carrying on businesses requiring a public grant in order to operate, such as our public utilities, still remains private property, although with reference to the latter there is an implied reservation of the right of governmental control and regulation based on the fact that the utilities cannot exist without the exercise of public functions, and it is a well-known principle that where public functions are granted the state retains the right of supervision and control of the business exercising the privilege.

All monopolies are illegal except where exercised by the state. Certain kinds of business, however, like public warehouses, insurance companies, banks, etc., sometimes by virtue of peculiar circumstances connected with their location acquire a "virtual" monopoly, or exercise public functions without any special grant from the state, and are said to be "invested with a public interest." It appears, therefore, that the difference between a business or property "invested with a public interest," and one "devoted to a public use," is rather shadowy and unsubstantial. In the one case the business could not be carried on without a grant from the state; in the other it would be illegal except for the toleration of the state; but manufacturers of foodstuffs and clothing and the producers of fuel are essentially private industries.

It requires no license from the state to engage in the business of grinding wheat, manufacturing overalls or mining coal, and in the pursuit of these occupations no public functions whatever are exercised. It is not within the province of the state to provide its citizens with food, fuel or clothing. That is the private concern of the individual himself. In the manufacture and production of these necessities of life neither the proprietor nor his workmen exercise any grants or enjoy any privileges derived from the government. They neither claim nor enjoy any partiality based on any grant or toleration of the public. They are simply exercising their natural and inalienable rights. They derive no benefits from or protection of the law, except such as are enjoyed impartially by their fellow-citizens in every other industry and walk of life.

To select these particular industries and deprive the owners and the workmen employed by them of the freedom of contract, untrammeled control of their

own property and their individual liberty, while leaving the balance of their fellow-citizens in the full possession of these invaluable rights; to burden the owners and workers in these particular industries with the supervision, control and management of a state commission, is a flagrant denial of the equal protection of the law guaranteed by the Fourteenth Amendment to the Constitution of the United States.

The police power of the state cannot be invoked in support of the provisions of the Kansas Industrial law under consideration. Out of the great mass of decisions by judges and comments by text writers on the subject of police power a few universally accepted principles may be deduced. The maxim, *"Sic utere tuo, ut alienum non laedas"*—"So use your own as not to injure another"—is that which lies at the foundation of the power. It would not be possible for people to live together in peace and harmony, or for society to exist, if it were not within the power of the state to restrain the natural rights of individuals to this extent. It is a power of negation and finds its expression in prohibition. It is quite true that occasions constantly arise for the application of this power to new conditions, but no conceivable change or improvement of the social or economic conditions of life can affect any change in the principles underlying its exercise.

It has been intimated that the enactment of regulations requiring safety apparatus in mines, safety appliances in machine shops, the regulation of the working conditions with a view to the preservation of life and health in dangerous places and unhealthy conditions, workmen's compensation laws, etc., constitute an extension of the police power beyond the scope of the maxim quoted. Not so. It is but an application of the law to new circumstances and conditions strictly in conformity to the principle, "So use your own as not to injure another." If perchance in the use of dangerous machinery, or in the employment of workmen in unhealthy and dangerous places, the law imposes upon the employer the expense of providing safety appliances, ventilating apparatus and other proper working conditions, etc., and if compliance with such law requires the expenditure of large sums of money by the owner of the property, it is not the depriving of the owner of his property without due process of law. He is not *compelled* to use the property at all, but if he does, he must so use it as not to injure others.

But in the enactment of the law under consideration for the first time since the beginning of the American constitutional epoch we have an entirely different theory of the police law presented. Here is a mandate from the state commanding the employer to operate; to employ the complainants in its factory; to pay to such employes a certain schedule of wages which it, the state, deems to be just and equitable; to pay the same rate of wages to women as to men for the same character of service; to furnish work to the "regular employes in each and every month so that the monthly earnings of regular workers shall be sufficient to constitute a fair wage under the Kansas Industrial Law as heretofore defined by this court," etc., etc.

The maxim, *"Sic utere tuo, ut alienum non laedas,"* is to be supplemented by another which might fitly be expressed, "So use your own as to afford regular employment to the workers and sustenance to the public." The "thou shalt nots" of the police power as it was are to be supplemented by the "thou shalts" of the police power as this new theory would have it exercised in the future. To the workers, as well as the employers, it carries the mandate "you must continue to work for the wages found by the court to be 'fair and reasonable' 'for such reasonable time as may be fixed by said court, or until changed by agreement of the parties with the approval of the court.'"

Between the genuine police power of a state which restrains one in the exercise of his natural rights and the use of his private property within those limits which makes it possible for all others to enjoy their rights of personal liberty and private property, thus creating that highest standard of freedom possible in organized society, which we call civil liberty, and that spurious and counterfeit thing masquerading under the name of police power which seeks to dominate, control and direct the actions and property of individuals in their private businesses, and within the domain of the inalienable rights of persons, a great gulf is fixed.

It is in vain for apologists of this law to advocate an "expansion" or "growth" of the police power to meet the supposed necessities of changed conditions of modern industrial and economic life. The inalienable rights of the individual cannot be invaded under any such pretext so long as the constitutional guarantees stand. If it were otherwise, the constitution itself would soon become obsolete, and the individual would possess no right that a majority of his fellow citizens could not take away from him. This point is well stated by Judge Cooley in his work on Constitutional Limitations:

> The maxim, *Sic utere tuo ut alienum non laedas*, is that which lies at the foundation of the power; and to whatever enactment affecting the management and business of private corporations it cannot fairly be applied, the power itself will not extend.
>
> The law can only guarantee to men, on a legal plane of equality, protection against trespasses upon their rights. To place the working classes under special protection against the aggression of capital, beyond the careful and strict enforcement of their rights; to compel the employer to pay the rate of wages determined by the state to be equitable, is to change the government from a government of free men to a paternal government, or a despotism, which is the same thing. (Tiedeman's limitation of Police Power, Sec. 178, p. 571.)

Recent decisions of the Supreme Court of the United States, to wit: Wilson v. New, sustaining the Adamson law, and Block v. Hirsh, sustaining the rent laws, have been thought by some to support the theory of the Kansas Industrial Court law. This claim cannot be maintained. In the one case the decision is based exclusively upon the commerce clause of the Federal Constitution, which, of course, is of equal dignity with the guarantees in favor of personal liberty and private property contained in that great instrument. The other sustains a law whose very terms put a very short limit to its existence, and which was passed to meet the demands of a great national emergency during a state of war. In the latter case it is said:

> A limit in time, to tide over the passing trouble, well may justify law that would not be upheld as a permanent change.

I think both these decisions are regarded as unsound by a great majority of the bench and bar of this country.

The case of State, ex rel. v. Howat, just decided by the Supreme Court of Kansas, contains dicta favorable to the law, but the questions discussed in this paper were not involved in the decision of that case.

CHICAGO'S NEW TRADE COURT

Significant Experiment in Direction of a More Expeditious Adjudication of Business Disputes Than Is Afforded at Present by Ordinary Processes of Litigation

By J. KENT GREENE

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THE success that has attended the first two months' operation of the voluntary trade court established by the Chicago Association of Commerce on May 4, 1921, and the foundation being laid for adjudicating business disputes expeditiously, have brought inquiries and manifestations of keen interest from all over the country.

With the growth of litigation in Chicago, the courts have gotten farther and farther behind in the trial of civil and criminal jury cases, and the number of judges has been increased from time to time, so that with the opening of the courts for jury trials next September, every jury calendar will surely be one year behind, and many of them two years behind. Much was made, a short time ago, of the fact that many criminal cases had been pending more than eight years. In some of them, undoubtedly, the State lacked evidence, so that in those cases it was convenient, in others it was necessary, to give the only excuse that was asserted openly by the States Attorney, that the lack of judges made it impossible to try the cases earlier. He threatened to take a number of prisoners before the judges trying civil cases, demanding that they leave the civil calendars and try the criminal cases, otherwise he would let the prisoners go free. The judges, while giving some relief, did not deem it wise to abandon the civil calls to the extent demanded by the States Attorney.

It was frequently asserted that although the courts worked conscientiously, their inability to try criminal cases soon after the commission of the crimes contributed largely to the prevalence of crime in the city. The county and city have seventy-three judges sitting within the city, with extra judges called in from outside counties, in all, several times the number required in all England to dispose of all the legal business of a vast commercial empire that is brought to that country, excluding of course, the very large number of cases that are heard before arbitrators. Yet the net result of all the courts here has been a getting farther behind.

With the public consciousness aroused because criminal causes could not be tried promptly, and because they had to give way in a measure to efforts to keep up with the civil work, the Chicago Association of Commerce took account of the results obtained abroad and determined to use the complete power of that immense organization to establish on a practical basis procedure under the recently enacted Arbitrations and Awards Act of the state.

The history of commercial arbitration in Illinois, prior to the Act of 1917, is practically the same as that in all the other states of the Union, where old methods of procedure have not been supplanted. There had been in force in Illinois for a number of years an Arbitration and Awards Act. This, together with the common law provision remaining in force, gave three methods of procedure. First: A pending suit could by agreement be referred to arbitration. Second: A cause not in suit could be submitted by observing certain formalities. In each of these cases the award could be filed in court and judgment entered thereon upon motion. The third method of procedure was known as common-law arbitration, wherein the parties, without observing the formalities of the statute, submitted a controversy by parole. In both satutory and common-law procedure, the parties could withdraw from the submission at any time before award rendered. The statute remained practically a dead letter until 1917, when the Credit Men's Association of Chicago, acting in conjunction with Chief Justice Harry Olson of the Municipal Court of Chicago, and his legal assistant, obtained the enactment of a new statute on the subject.

Experience was had with this act principally by the assistant to the Chief Justice, in the disposition of cases pending in the Municipal Court of Chicago, and it was found that further amendments were needed. These were added by the Act of 1919. Amendments increasing the cost of jury trials in the Municipal Court and reducing the total court costs in arbitration cases to the nominal fee of $1 and in contested cases to $3, applying to all courts of record in Chicago, were added by statutes in force July 1, 1921.

In February, 1921, the Supreme Court of Illinois (White Eagle Laundry Co. vs. Slawek, 296 Ill. 240) held in a case in which the Association of Commerce interested itself that the new act was constitutional, that a submission to arbitration once entered into was irrevocable even before award rendered, and that the act in so providing did not take property without due process of law or violate any other constitutional right.

After this decision, the Chicago Association of Commerce set about establishing voluntary trade courts which should act in close co-operation with the Commercial Arbitration Committee of the Association. On May 4 the Commercial Arbitration Bureau was established and the first trade court began to function. The manager of the Bureau receives a salary, but no part of any fees earned in arbitration matters, it being deemed advisable to remove from him the criticism that in any cause to be arbitrated by him, he would be interested for the litigant that would most likely secure him in his fees. Hence, all fees earned are paid to the Association of Commerce.

With the salary of the manager and secretary, expenses of office, law library, the sending of thousands of letters to members of the Association, attorneys and business concerns, and the expenses of propaganda, it was not pretended that the Bureau should be at once self-sustaining. Hence, public spirited business men were appealed to, from whom was obtained a sufficient budget to meet all expenses of the Bureau for two years. Though the Associa-

tion felt that the movement would justify its expense if the business interests, the courts and members of the Bar would sustain it, there was of course some slight degree of doubt at first as to whether this support could be obtained. Two months of operation have, however, more than justified all that was hoped for it, because business interests, members of the Bar and the Court have extended their heartiest co-operation. Causes are being submitted, and prospective litigants are being shown the advantages of submitting causes to these voluntary tribunals rather than await the slow processes of the courts.

The Arbitrations and Awards Act as amended in 1919 provides "that all persons having requisite legal capacity may, by an instrument in writing to be signed by them, submit to one or more arbitrators to be named in the manner indicated by such writing, any controversy existing between them."

Under this provision, the parties sign a short form of submission, the arbitrator takes the statutory oath "faithfully and fairly to hear, examine and determine the cause and controversy according to the principles of equity and justice, and make a just and true award, according to the best of his understanding," whereupon the parties proceed to hearing, very much the same as would be done before a court, eliminating, however, many matters that have to do merely with methods of procedure.

The parties to the submission designate the number of arbitrators, which number may be one or more as the parties shall agree; the manner in which they may be appointed in the first instance and vacancies caused by the refusal, incapacity or death of an appointee filled; the time and place of the hearing and the rules for hearing such controversy not in conflict with the provisions of the Act.

On the question how many arbitrators should be selected in a given cause, it is often thought that each party should select one and those two a third for umpire. It is often found, however, that the two parties selected are advocates for the litigants selecting them, so that there is in reality only one arbitrator.

In most causes, therefore, the parties have selected but one to act. The submission to arbitration has provided that the person to act as arbitrator shall be selected by the Commercial Arbitration Committee of the Association, and has even added the proviso that the one selected shall not belong to either one of the trades to which the litigants belong. Very often a member of one trade will not be willing to submit his cause to a person belonging to the trade of his opponent, because of the supposed close business and trade associations of those in that group, and very often he will not want to submit his cause to a member of his own trade, because he is deemed a business rival.

Prejudice growing out of this business association is also manifest from the fact that it was found that many trade associations had made a provision for common-law arbitrations or arbitrations under the old statute, with penalties under the association by-laws for not complying with demands for arbitration, or for not submitting to awards. But these association arrangements never functioned outside of their own membership, as practically no person not a member would submit his cause to the decision of arbitration committees selected by such machinery.

This indisposition of litigants in some cases to submit their causes to members of their own trade, and in others because they fear arbitrators belonging to the trade of their opponent, leads to the conclusion that there are only two classes that in general will be acceptable as arbitrators. These are persons who have had experience in these trades and have retired from them, or they must be attorneys. As questions of law are usually more difficult than questions of fact, it is believed litigants generally will be more satisfied with the decisons of lawyers than of tradesmen. Experts in particular trades can act as witnesses, and the benefit of their experience can as readily be obtained as if they acted as arbitrators.

No class is better fitted to take the place of these tradesmen than is the experienced attorney, because his habits of study and practice enable him to master unusual problems more quickly than others.

However, the Act is elastic in providing that the arbitrator may state his final award as to the whole or part of the reference in the form of a conclusion of fact for the opinion of the court on the questions of law arising, so that if the arbitrator is not informed on the questions of law, he may pass on the facts alone, leaving the law for the court.

The parties to the submission may, pursuant to the conditions of the statute, include by reference in the written submission the published rules of any organization or association, which rules shall thereby become a part of the contract of submission, provided that before the signing of such submission, the rules shall have been approved by the court that under the submission is authorized to take jurisdiction of the matter. This provision was to prevent unworthy business concerns, such as disreputable loan sharks, from having unjust rules and forcing their victims to abide by them. The provision also gives to a trade court a quasi-public standing, whose procedure may in a measure be regulated by the courts.

These rules are valuable in enabling the association under whose auspices the arbitration is had to assist in the selection of arbitrators if there should be a vacancy, or where the instrument of submission leaves the selection to the association or a certain committee thereof—a common provision where there is a clause in a contract for arbitration of future disputes. Further than this, rules are cumbersome and are not used, as they would tend to complicate what is a very simple proceeding.

Although the submission to arbitration is irrevocable, the parties may take the matter into court under certain circumstances:

> Any party to any such submission or adverse award thereon, not fully adjudicated by the court, who may legally claim that there exists in his favor any right to maintain proceedings in bankruptcy, injunction, receivership, attachment, attachment in aid, garnishment, replevin, distress for rent, execution or other writ or process for the seizure or sequestration of property, shall not, because of any such submission or award not fully adjudicated by the court, be barred from maintaining any such remedy, unless the same is waived in such submission, but the remedy in any such case shall extend only to placing the property seized or sequestered in the custody of the law, or to protect the rights of the parties pending the making of a partial or a final award covering the rights and duties of the parties in respect to such proceedings and the action of the court thereon.

Arbitrators are given power to administer oaths, subpoena and examine witnesses, authorize the taking of depositions, and issue subpoenas *duces tecum*, requiring the production of documents; obedience to such orders being enforced by application to the court.

The submission to arbitration may be filed in court at any time after its execution, and upon being

filed the court takes jurisdiction of the parties and subject matter of the submission, without the filing of any pleadings whatsoever. The arbitrator may of his own motion, and shall by request of a party at any stage of the proceedings, submit any questions of law arising in the course of the reference for the opinion of the court stating the facts upon which the question arises, and such opinion when given shall bind the arbitrator in the making of his award. He may state his final award as to the whole or part of the reference in the form of a conclusion of fact for the opinion of the court on the questions of law arising, and successive judgments may be entered from time to time as may be desired.

Partial awards may be made from time to time as may be desired, a true copy thereof being delivered to each party. Under this provision, even though there is a contest as to the whole amount the plaintiff seeks to recover, the arbitrator may make an award as to the most obvious portion and reserve other portions for further hearing—something that is not done in ordinary court procedure.

If either party neglects to comply with any partial or final award, the other party at any time within one year may file the award together with the submission in court and, upon giving ten days' notice, if no legal exceptions are taken to the award, have judgment thereon. Upon exceptions taken, the findings of fact by the arbitrator are conclusive. Successive judgments in the same case may be entered on successive awards. If the award requires the performance of any act other than the payment of money, the court entering the judgment shall enforce the same by rule, and the party refusing or neglecting to comply with such rule may be proceeded against as for a contempt.

If the award is not sustainable on questions of law, the court may set aside the award or remit the matter to the reconsideration of the arbitrator, or if the award was obtained by fraud, corruption or other undue means, or if the arbitrator misbehaved, the court may set aside the award. If there is any evident miscalculation, or misdescription or if the arbitrator has awarded on matters not submitted to him, not affecting the merits of the decision upon the matter submitted, or where the award shall be imperfect in some matters of form not affecting the merits of the controversy, and where such errors and defects if in a verdict could have been lawfully amended or disregarded by the court, any party aggrieved may move the court to modify or correct the award.

Writs of error and appeals on questions of law are allowed as in other cases. The parties may in the submission agree upon the amount of compensation to be paid to the arbitrators. Hereunder the Association of Commerce has provided that where the official arbitrator of the Association acts, the compensation instead of being paid to him, shall be paid to the association itself, the schedule of fees being as follows:

Where the matter in contest does not exceed two hundred dollars, the sum of five dollars.

Where the matter in contest exceeds two hundred dollars but does not exceed one thousand dollars, the sum of seven and one-half dollars.

Where the matter in contest exceeds one thousand, the sum of ten dollars.

Where more than one thousand dollars is in contest, there shall be charged, in addition to the above, two per cent on the first thousand dollars and one per cent on all over one thousand, up to five thousand dollars, and one-half of one per cent on all over five thousand dollars, or such other fee as may be arranged for.

In determining the amount in contest, the amount that is admitted to be due shall be deducted.

In special cases, arrangements will be made for special compensation, as where the work to be performed is not commensurate with the amount involved, or where, as in the case of unexecuted contracts, there is no amount yet involved. Such compensation will usually be at the rate of five dollars per hour of time actually spent on the cause.

The fees are paid by the unsuccessful party unless there is an agreement to the contrary.

The Association contends that the lawyers will be greatly benefited by the service to be rendered by a voluntary commercial court for the following reasons:

1. All difficult questions of procedural law are eliminated. Such questions are not usually appreciated by clients and are not a very satisfactory basis of charges for services.

2. The most unsatisfactory, expensive and annoying features of the legal profession are the delays and continuances of cases in court and the attendance upon court calls, so that many attorneys refuse to take court practice, while others employ clerks to attend to most of it. But in arbitration procedure any attorney can represent a litigant with the very least delay, expense and annoyance.

3. Because of the very unsatisfactory condition of the court dockets, business men have heretofore preferred not to start lawsuits where the chances of success have appeared in the least doubtful; they have given vast sums of money to effect compromises rather than go through the above experiences. These apparently doubtful cases would be litigated and the money now reluctantly paid in compromises would go in part to pay counsel fees if these up-to-date business men could have their cases adjudicated without delay, expense and annoyance.

4. Business will be disposed of and compensation paid in a very short time. The overhead for watching many court calls will be reduced. Cases that were considered good when started will not be imperilled through scattering and death of witnesses.

5. Making this procedure popular will open a field for attorneys to become arbitrators. The Bureau, will on request of parties, use its good offices to obtain the best expert advice possible. Some have indicated a willingness to act for a limited time without compensation.

The Association has also set forth five principal reasons why commercial arbitration is preferable to ordinary court procedure, as follows:

1. It is quicker. Your case never has to wait on a crowded court calendar. It can be disposed of immediately under arrangements convenient to all concerned.

2. It is cheaper. Every step is direct and at a minimum of cost, just like any business undertaking.

3. It provides one or more to try the case, who are qualified by long experience in business. Experts in particular trades will be provided as witnesses. No jury can possibly understand the precise nature of many business deals as well as a business man of long training in the particualr trades. Instead of ignorance and delay and muddling on the part of untrained jurors, it affords for the first time an expert tribunal.

4. It does not result in enmity between the parties, as does the ordinary lawsuit. On the contrary

it permits of continuing the ordinary relations of buyer and seller while the difference is being adjudicated.

5. It avoids the publicity necessarily attendant upon court procedure, which, by revealing secrets to business rivals, is often ruinous to litigants.

Considerable interest has been shown in a recent award by the Commercial Arbitration Bureau of the Association, wherein, after the execution of a contract to manufacture and deliver, but before there had been any manufacture or delivery, a controversy arose as to the interpretation of the contract, and upon that controversy being submitted to the Bureau for arbitration, the rights of the parties were declared under the contract.

The Illinois law does not elsewhere authorize the procedure known as entering declaratory judgments, but it is contended that under the Arbitrations and Awards Act of Illinois, such procedure may be taken.

We are aware that in the case of Anway v. Grand Rapids Railway Co., (179 N. W., 350) the Supreme Court of Michigan held unconstitutional an act of the Legislature of that state which provided that no proceeding should be open to objection on the ground that a merely declaratory judgment, decree or order was sought, and that the court might make binding declarations of rights, whether any consequential relief is or could be claimed or not. The court held that the attempt to confer this power upon the courts was an attempt to require the performance of functions not judicial in character, and said that it was apparent that by the Act the courts of the state were made the legal advisers of three millions of people.

It is apparent throughout the opinion that the Act was considered an attempt to force the courts to give opinions on questions of law in advance of any real controversy, and hence the Act was beyond the power of the Legislature.

The Legislature of Kansas having this decision in mind, passed the Declaratory Act of February 23, 1921. (See Journal American Bar Association, March, 1921, page 107.) The Kansas Act provides that

> In cases of actual controversy, courts of record within the scope of their respective jurisdictions shall have power to make binding adjudications of right, whether or not consequential relief is, or at the time, could be claimed, and no action or proceeding shall be open to objeciton on the ground that a judgment or order merely declaratory of right, is prayed for.

The Arbitrations and Awards Act of Illinois provides that

> All persons having requisite legal capacity may by an instrument in writing to be signed by them, submit to one or more arbitrators to be named in the manner indicated by such writing, *any controversy existing between them.*

It is nowhere made a condition to the submission that a cause of action shall exist. All that is necessary is that a controversy shall exist between them. This is different from the Michigan case.

The courts cannot be asked to advise the people on any matter. As stated in Heck v. Bailey (204 Mich., 54), quoted in the Anway case *supra,* "Courts do not speak through their opinions, but through their judgments and decrees." If one of the functions of a court is, as stated in the Anway case, to advise the three million people of the state, it might have but little time to do anything else, because of the many applications founded on chimerical and supposititious questions. There must be an existing controversy between existing parties before any court can act. With such existing controversy not founded on supposed or expected happenings, but upon actual facts, the power of the Trade Court under the Arbitrations Act of Illinois can be invoked, and that it was the intention of the Legislature of Illinois to permit arbitrators to make declaratory awards is apparent from the section of the Act that provides "when the award requires the performance of any act other than the payment of money, the court rendering such judgment shall enforce the same by rule, and the party refusing or neglecting to comply with such rule may be proceeded against by attachment or otherwise, as for a contempt."

A declaratory award cannot be an award of the payment of money. It must declare the rights of the parties under existing circumstances, and direct them how they shall proceed. We submit that such was the intention from the provision that successive judgments in the same case may be entered on successive awards, so that after the preliminary or partial award declaring the rights of the parties, the arbitrator under direction of ths court may direct them from time to time how to proceed. It must be kept in mind that the declaratory award not only interprets the rights of the parties as to the law, but often disputed facts have to be determined.

If the declaratory award can be sustained in law, as we confidently believe it can, the usefulness of commercial arbitration will be greatly enhanced. Questions become more complicated, especially from the legal standpoint, after a cause of action has arisen thereon, and after circumstances have become more acute and driven the parties to extreme partisan action.

It was stated in the able article on the proposed uniform legislative act on declaratory judgments in the May, 1921, issue of the Harvard Law Review (page 716):

> Under the procedure authorizing declaratory judgments, with its simplicity, its capacity to serve important ends of corrective justice without legal hostilities, its utility in deciding many questions which cannot now be brought to judicial cognizance, and its efficacy in removing uncertainty from legal relations before it has ripened into a bitter litigation, the American public may look forward to a more amicable and simple method of adjusting many conflicts of interest and to an enlarged social service from its courts.

Time for Uniform Mortgage Act

As everyone knows, money is now loaned to a large extent by creditors in one section of the country on mortgages of property in some other section. If the law were uniform it would make such loaning easier, as the Uniform Negotiable Instruments Act has greatly benefited the commercial paper business. The person with money to advance would know that the mortgage offered to him from another State was governed by the Uniform Law; and this certainty as to the nature of the security would make him more ready to take the loan. Further, there are unsatisfactory provisions and uncertainties in the mortgage law in many States, which would be removed by a Uniform Act.

The success of the Uniform Negotiable Instruments Act, Uniform Sales Act and other Uniform Commercial Acts has been such that the States are much more willing than formerly to pass uniform legislation. The time seems propitious for adding a Uniform Mortgage Act to the list.

THE SUPREME COURT OF THE UNITED STATES

Response of the Late Chief Justice White to Toast at the Annual Banquet of the American Bar Association at Washington, Oct. 22, 1914

TO respond to a toast has always seemed to me submitting oneself to a roast because of the discomfort by anticipation, the misery in performance and the dissatisfaction on account of the things unsaid since only afterwards thought of. In addition, I have refrained since becoming Chief Justice from accepting invitations to make after-dinner speeches because of a tradition that that official was never to be expected to reply to an after-dinner toast. The warmth of the request of the committee in this instance compelled me to consider the reason of the tradition, and I have become convinced that it is not far to seek, since, putting aside the impossible suggestion that there was danger in the Chief Justice agreeing to make a speech after dinner, it is apparent that the rule rests alone upon the assumption that if he said something, he might do that which he was not expected to do, and if he said nothing, he might fail to do that which ought to have been done.

But be this as it may, after overcoming the personal disinclination because of a feeling that to accept the invitation would afford an opportunity to avail of that so infrequently relied upon constitutional provision, the equal protection of the laws, by turning the tables on my brethren of the profession and compelling them to be listeners, no difficulty was experienced in departing in this instance from the tradition, since in no possible view could it have application to the Chief Justice speaking in his own household and to members of his own family. And where, I submit, could he be more at home than at the hospitable board of the American Bar Association, surrounded by its members, his professional brethren?

The toast is "The Supreme Court of the United States," but the eloquent words which have just been spoken by my brother Carson demonstrate that the thought underlying its proposal is not the general jurisdiction of the great tribunal which the toast names, but rather the power conferred upon that court to interpret and uphold the constitution and to declare all acts which transcend its limitations to be void, thus sustaining the lawful authority of the nation, protecting the legitimate powers of the states and securing to all the people the enjoyment of their constitutional safeguards. But these dominant considerations concern not only the Supreme Court of the United States, but every court, national or state, since such power rests in every court in the land because it inheres in all judicial authority under our system of government. Availing myself, then, of the judicial duty of coming to consider that which is essential, I paraphrase the toast as one to the courts of the United States, both state and federal, whether of high or low degree, whether of extended or limited jurisdiction, all to be considered in the light of the authority which they possess and the duty which rests upon them of applying and enforcing the Constitution as the supreme law of the land against all infractions from whatever source proceeding.

Thus fixing the subject for consideration, the first thought that comes to my mind is, in view of the vastness of this power, how completely its creation or recognition and the provisions for the mode of its exercise expressed the faith of the fathers in free government and the power of a free people to perpetuate the same. I say this because the very conception of the power in and of itself was a supreme manifestation of the profound faith which was in them and because the mode provided for the exertion of the power from its simplicity accentuated and made more self-evident the abiding faith by which they were controlled. Thus, while as to practically every other power created, checks and balances of various kinds were resorted to to limit the mode of the exercise of the power or to give sanction to it when exerted, as to the power to interpret and enforce the Constitution conferred upon, or recognized as existing in, judicial authority, no checks were interposed and no sanction whatever was ordained concerning its exertion, the power great as it was, therefore, in its ultimate conception being made to rest solely upon the approval of a free people.

My second thought, as I comprehensively contemplate the mode in which the judicial power has been exerted from the beginning by the courts both national and state, of all degrees of jurisdiction, is one of marvel at the devotion, the fidelity, the self-restraint and the love of country with which the power has been exerted; how rare the abuse, how infrequent the slightest semblance of ground for the belief that wilful wrong was committed, that is, that there was an intentional transgression of authority. What a tribute this is to our profession—for judges and lawyers are one. Indeed, as I look at the subject, and contemplate the varied methods by which judges have been selected, the frequent shortness of their tenure, the almost usual inadequacy of their compensation, the natural exultation and pride in our profession which comes to me is tempered by a sense of reverent restraint, since the thought cannot be resisted that a result so remarkable has been brought about by the dispensation of a Merciful Providence in vouchsafing the fulfillment of the promise, "As thy days, so shall thy strength be."

The third thought is how marvelously the existence of these United States as they stand today a mighty people, with a national government adequate to fulfill its purposes, with state governments sufficient to preserve local autonomy, and with its millions of people all free and yet all restrained by those limitations which make men free, is due to the wisdom of the fathers in lodging the ultimate protection of the Constitution in judicial authority, and thus saving the confusion and conflict from which the destruction of our institutions would otherwise have arisen. I know not better how to make this truth obvious than by asking you to picture what would be our condition today if from the beginning we had been deprived of the balance wheel which judicial interpretation has afforded to the maintenance and development of our institutions. I know it may be suggested that this view is a mistaken one since it attributes to the exercise of judicial power beneficial results which were naturally brought about by the operation of economic and other

forces; a view which, it is insisted, is demonstrated by the outbreak of the mighty conflict of the Civil War. I might well leave the contention to answer itself by the obvious disproportion between cause and effect which it embodies, for who, may I ask, would venture to suggest that because a meteor fell across the sky therefore the great laws by which the harmony and movement of the universe are maintained had no existence and produce no effect? I pause, nevertheless, for a moment to point out the miseonception of the suggestion. I take it it may not be at this day doubted that the underlying controversies which brought about the Civil War existed prior to the Constitution as the result of divergent institutions or conditions and conflicting opinions which were not adjusted or harmonized when that instrument was adopted and therefore were left open for subsequent adjustment, and which, by the operation of the laws of self-interest or of conflicting conceptions of duty or even as the consequence of human passion, it became impossible to settle, and which therefore were fanned into the flames which caused that great conflagration. But neither side to that mighty controversy struggled to destroy constitutional government as they understood, but both on the contrary sought to perpetuate and preserve it as it was given them to believe that it should rightfully exist. Underlying the whole struggle, therefore, on both sides, when it is dispassionately looked at, was the purpose to protect and defend free and constitutional government as it was deemed our fathers gave it. And this affords a ready explanation of how when the smoke of battle had passed away and the storm had subsided, the supremacy of our constitutional system by natural operation resumed its sway, and peace and brotherhood reigned where warfare and enmity had hitherto prevailed.

Let me illustrate. Do you recall the toymaker and his blind daughter, created by the genius of Dickens and so admirably interpreted by that great artist, Joseph Jefferson, in "Cricket on the Hearth," where with a tenderness which may not be described, mistaken though it may have been, in order to conceal the poverty and misery of his surroundings the father pictured to the blind one whom he so much loved his environment as one of prosperity and affluence? Let us listen to her as she places her hand upon his threadbare gray coat, which she deemed from his description to be one of some rich fabric, and hear her question, "What color is it, father?" "What color, my child? Oh, blue—yes—yes, invisible blue." And now with the mists of the conflict of the Civil War cleared from my vision, as my eyes fall with tender reverence upon that thin gray line, lo, the invisible has become the visible, and the blue and the gray, thank God, are one. See it again illustrated in that flag which stands behind me. I can recollect the day when to me it was but the emblem of darkness, of misery, of suffering, of despair and despotism. But ah! in the clarified vision in which it is now given me to see it, as I look upon its azure field it is glorious not only with the north star's steady light, but is resplendent with the luster of the southern cross; and as I contemplate its stripes, they serve to mark the broad way for the advance of a mighty people blessed with that plenitude of liberty tempered with justice and self-restraint essential to the protection of the rights of all. And thus again I see, although the stars and bars have faded away forever, the fundamental aspirations which they symbolized find their imperishable existence in the stars and stripes.

Great as is the pride which the considerations just stated afford us as members of our profession, it surely will be the pride which goeth before a fall if our free government should suffer detriment because of our failure to remember and earnestly devote ourselves to the duty which rests upon us concerning it. It is indeed a great duty when the consequences which may result from a failure to perform it are considered, consequences which will be fruitful in misery not only for our own countrymen but to mankind generally; for who can foretell the obscuring of the light of liberty throughout the world which would necessarily result from a failure of our constitutional system? Mark you, I am not speaking pessimistically and am not intimating, because now and again some doctrines are boldly asserted and seem to meet with approval which by their mere statement are so destructive of representative government as to give rise to a sense of despair or at least to cause the foreboding that they foreshadow the possibility of complete extinction of our government by the disregard of the essential truths upon which it must rest, that I am of the opinion that such a result will be accomplished. I say this because the things I refer to, all of them, I think, are but local and ephemeral and they serve to demonstrate one of the wonderful advantages of our system of local government, since it affords a means for confining and localizing the maladies which disappear long before there is the slightest danger of their becoming operative and effective within the great body of the people. Indeed, I cannot conceive the thought that whatever betide and however general might become a popular aberration, the consequence would be that the light of constitutional liberty would go out forever, since there is given me the faith to believe that however complete might be a conflagration which destroyed the noble edifice of our constitution, as long as the traditions of the American lawyer survived they would suffice to afford the energy and insight from the exertion of which a new and enduring edifice of liberty and representative government would arise. But think of the sorrow and the suffering to be endured while such process of rehabilitation was being carried out.

But the question naturally comes, what are the dangers which threaten us and how is the duty to be performed of guarding against them?

In the first place, there is great danger, it seems to me, to arise from the constant habit which prevails where anything is opposed or objected to, of resorting without rhyme or reason to the Constitution as a means of preventing its accomplishment, thus creating the general impression that the Constitution is but a barrier to progress instead of being the broad highway through which alone true progress may be enjoyed. Upon whom does the duty more clearly rest to modify and correct this evil than upon the members of our profession?

In the second place, it seems to me one of the greatest evils which threaten us is, as it were, a forgetfulness of our system, a growing tendency to suppose that every wrong which exists despite the system and which would be many times worse if the system did not exist is attributable to it and therefore that the Constitution should be disregarded or overthrown. This rests alone upon a forgetfulness of the considerations which underlie the Constitution and of the im-

mortal truths which they embody. Why I recollect but a few years ago meeting a distinguished public man who had just been delivering in one of our great universities a series of lectures on our constitutional system of government. He said to me: "I was surprised to have one of my listeners, a student far advanced in his university life, say, 'It gave me so much pleasure to hear your lectures, for they were the first kindly words I have heard said about our government since the commencement of my university career.'" I recollect myself a few years ago being in the atmosphere of a university and feeling that there existed among the student body either a profound apathy or a great misapprehension as to our government, the division of powers which it created and the limitations which it embraced; and in mentioning this impression to one quite familiar with the environment I was surprised to hear him say: "Oh, yes, you are quite right, that is the impression which here prevails. Indeed, I think it comes from the state of mind of the teaching body." Doubtless in a large measure this state of mind has imperceptibly and gradually grown from the evil habit which I just a while ago referred to of invoking the Constitution in such a way as to create the profound impression that its restraints were but limitations on true development and were therefore the means of preventing the onward and upward march of our race. Who can better gradually rectify this condition of mind than the members of our profession if only they determine with increased devotion to give themselves up to the correction of errors and wrongs which may exist despite the principles involved in our constitutional government and thus convince that true progress lies in fructifying and making them operative and not by destroying them?

In the third place, it seems to me that there is a tendency, not so great now as it was a few years ago, as admirably illustrated by efficient work in some respects done by the American Bar Association, to be lukewarm concerning attacks upon fundamental and essential Constitutional provisions, to take it for granted that they may not be overthrown, when on the contrary the plain duty is to be alert, to be insistent, to be devoted, at all times and on all occasions to defend against the least encroachment, to point out the dangers which must come and thus to keep ever vividly present and quickened in the minds of all the people the necessity of adhering to and upholding the Constitution if they would preserve the heritage of liberty which they have received.

At the outset, seeking to express the true resonance of the toast to which I was called upon to respond, I ventured to modify its form of statement so as to make it all-embracing and thus virtually cause it to be but the expression naturally to be expected from this body of lawyers. Now as I come to a conclusion may I be permitted to strike a chord for the purpose of evoking the noble harmony which underlies the toast as I at the outset interpreted it, by proposing one to the health of the American lawyer, which includes the American judge, as bench and bar are one; not alone of the judges of courts of extended jurisdiction and of last resort, but of all, however limited their jurisdiction; not alone of lawyers engaged in great affairs, but of all, however narrow may be the sphere in which they move. And in thus re-expressing the toast or rather echoing it as expressed, may I not be permitted to indulge in the heartfelt aspiration that there may be given to them all a deep and reverent purpose of faithfully discharging the duties which rest upon them, to the end that our free institutions may be preserved and may be transmitted unimpaired to those who are to come.

In Memory of S. S. Gregory

Presentation of a portrait of the late S. S. Gregory to the Chicago Bar Association on May 20, was the occasion for some notable tributes to the life and character of the man. Mr. Horace Kent Tenney presided at the exercises, and Mr. Edward Osgood Brown, Mr. Gardiner Lathrop, Mr. Robert H. Parkinson and Mr. Salmon O. Levinson made brief talks. Mr. John R. Montgomery, President of the Chicago Bar Association, responded in behalf of that organization.

Space is lacking for the reproduction of these notable tributes. The following extract is from that delivered by Judge Brown:

> To those who knew him as I did, he always seemed the ideal lawyer. Honorable and straightforward in all his dealings, with clients, antagonists and courts, it goes without saying, he always was. His nature allowed no deflection from such lines in his relation to his fellow men. Able, diligent and careful in all the multitudinous duties which he undertook in behalf of his clients, ever subordinating his own interest to theirs, always eager to assist the court, by clearly and frankly defining the issues in any litigation in which he was engaged, attentive to all of the courtesies which should prevail between honorable opponents at the Bar, and never soiling his forensic efforts with even the shadow of unfair dealing with witnesses or parties—his record would have been, even without the great individual characteristics of which I mean to speak, brilliant and unexceptionable by any standard generally applied to the eminent and leading members of the Bar. . . .
>
> Beyond all the lawyers of my acquaintance in the long years I have passed among them, he carried through his life and followed in his actions, at any sacrifice of time, energy and material rewards, those ideals which alone make a noble and ennobling profession out of what without them might be a sordid and huckstering trade.
>
> His belief in and respect for the higher ethics of his profession was characterized by no pretense of lofty sentiments unaccompanied by corresponding acts, by no mere lip service in addresses on holiday occasions. He felt that in becoming a lawyer he had undertaken to be a servant of justice among men. And he believed that the service he had undertaken required him to see to it to the best of his ability and talents that unpopular men, unpopular cases, and helpless and unfortunate people should not fail of fair and adequate representation and protection before the tribunals of the law.

Yellow Paper and Eye-Strain

Books and newspapers would be more easily read and less productive of eye strain upon the readers if they were printed on yellow tinted paper, according to Dr. John E. Dutcher, associate professor of physics at Indiana University.

The yellow rays, Dr. Dutcher says, have more penetrative power than white rays, and have a beneficial rather than a wearying effect on the retina of the human eye.

He points to the fact that many automobile manufacturers are now having yellow lenses placed in automobile lights since the penetrative power through dust and fog is greater than that of white light, which is really a combination of other colors.

AMERICAN BAR ASSOCIATION JOVRNAL

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THE NEW CHIEF JUSTICE

President Harding's appointment of Ex-President Taft to be Chief Justice of the Supreme Court of the United States is an event which to the lawyer suggests some interesting reflections as to the contrasts between two great offices.

The President of the United States occupies a position of power and pre-eminence second to none other. The opportunity for the service of one's country is almost unlimited, but the President is burdened with many heavy responsibilities from which there is no escape and which cannot be delegated to or even shared by others. He must decide problems which may involve the success or failure of his administration, the victory or defeat of his party in the next campaign, the financial prosperity of the country or the prostration of its industrial life, and not infrequently the honor of the nation and the dread alternative of war.

The circumstances necessarily attendant on the making of such momentous decisions are not conducive to the exercise of calm judgment or the ascertainment of truth. Often they must be made in the midst of the tumult and clamor of great public disputation when the voice of wisdom is not uttered or not easy to be distinguished. Because of the fact that his office is political, and because politics in the country is so intensely partisan, no President, during his incumbency of the office, has lacked critics. He has been frequently misunderstood and too often misrepresented. The unkind and unjust things that were said by his contemporaries about our first President are almost beyond belief.

The position of Chief Justice of the Supreme Court of the United States cannot of course be put above that of the President, but there are many reasons why a man reared in the atmosphere of our profession, a student of law as a science, and particularly one who has attained high rank on the bench, may regard the position as preferable in many respects to the presidency. Possibly Chief Justice Taft so regards it.

The function of the judge is to declare, interpret and apply the law without regard to personal or partisan considerations. This function has been so long and so fully understood and the conduct of our judicial officers has been in such close accord with high ideals that the people now rarely criticize the decisions of a judge and almost never place on him the blame for an unpopular law. They know that he did not make it but that he found it already made, and hence the critical attitude which we take towards our Chief Executive is not taken towards our Chief Justice.

The problems to be decided by a judge of the court of last resort are difficult and perplexing, but the atmosphere in which he works is calm and tranquil. There is no tumult or clamor. Even when there is difference of opinion among the nine great men who constitute the Supreme Court of the Nation, the most earnest dissent is deferentially expressed, and is marked by as much courtesy as conviction. Nor is there lack of valuable assistance in the solution of the difficult problems which come before the great tribunal. The conclusions of the learned judges who have studied the cases below are before the reviewing court with full statement of the reasons on which the judgments are based, and on each side of the controversy learned counsel lend the aid of their scholarship and experience.

There must also be a comforting sense of repose in the consciousness that one may devote himself to his high duties, free from all anxiety on account of the proverbial uncertainties of popular elections.

The tenth Chief Justice comes to his post of duty and responsibility with a wider range of experience in the great things of public life than any of his predecessors. He has always been recognized as possessing in a high degree the judicial temperament, and his judicial career has commended him to the men of his profession. During the great world war he proved that love of country

and of his country's cause came before every other consideration.

May he find the intellectual pleasure which comes from association with great minds, the serenity derived from respect and affection, and the happiness which springs from opportunity for useful service, in a post of supreme importance.

THE KANSAS INDUSTRIAL COURT

The second of the series of three articles dealing with this important subject appears in this issue of the JOURNAL.

In determining whether or not this effort to substitute justice for force in industrial controversies is founded on sound principles, it is, of course, necessary to give most respectful consideration to all sincere criticism.

This subject is one of direct and personal interest to lawyers because if controversies concerning the rates and conditions of employment are found to be justiciable, and if a method of deciding such controversies according to the right and justice of the case be developed and brought to a state of efficiency which proves it to be more satisfactory to both parties than strikes and lockouts, the lawyer's field of usefulness will be greatly enlarged.

Col. Dean's criticism of the project is as sincere as it is able and will prove to be interesting and profitable reading.

THE NUMBER OF THE CHIEF JUSTICES

Recent comment on the death of the late Chief Justice and on the appointment of his successor discloses a controversy as to the number of men who have held that exalted position.

In its editorial columns the Journal has referred to the late Chief Justice as the ninth, but very distinguished authority has challenged the correctness of this numeration on the ground that John Rutledge, usually referred to as the second Chief Justice, was not entitled to be so considered, the Senate having refused to confirm his appointment. The decisive point is the status of John Rutledge. If he is entitled to be counted among the Chief Justices, White was the ninth and Taft is the tenth.

In 3 Dallas at p. 121 appears the following:

> A commission, bearing date the 1st of July, 1795, was read, by which, during the recess of Congress, JOHN RUTLEDGE, Esquire, was appointed CHIEF JUSTICE till the end of the next session of the Senate.

Paragraph 3 of Section 2 of Article II of the Constitution provides:

> The President shall have power to fill up all vacancies that may happen during the recess of the Senate, by granting commissions which shall expire at the end of their next session.

John Rutledge entered upon the discharge of the duties of that office at once, pronounced the judgment of the court in U. S. v. Peters, (3 Dall. 129), and signed the Writ of Prohibition in that important case as Chief Justice (ibid p. 132). In Talbot v. Janson (3 Dall. 133) he participated with Paterson, Iredell and Cushing in the affirmance of a judgment by Wilson, sitting in Circuit. No other cases were decided during his brief incumbency. His associates certainly recognized him as Chief Justice, and the doubt as to his title to the office seems to be of comparatively recent date, and to be unfounded, for his appointment was made in strict conformity with the constitution and was followed by acceptance and user.

There is more room for controversy as to the reasons for the refusal of the Senate to withhold consent to his appointment when that matter came before that body for action after the summer recess. It has been said that the reason for the rejection of his name was his failing mental health, and this view is somewhat supported by his nervous breakdown at about the time of his rejection, from which he never recovered.

It is, however, significant that contemporaneous comment on the subject attributed the action of the Senate to the fact that Rutledge had bitterly condemned the Jay treaty which the Federalist majority in the Senate had approved. It is not difficult to believe that in those days of post-war bitterness the Senate might not have been free from resentment for opposition to its course and that the "failing mental health" might have been a result rather than a cause of the rejection.

CONTRIBUTIONS

The board of editors wish the members of the Association to feel that the Journal is a forum in which every question of broad interest to the profession in general may be discussed. Articles and letters are welcomed and those who send them may be assured that they will receive prompt and careful attention.

Articles cannot always be published in the number following their acceptance. Those who send them, however, may rest assured that material which is found available will appear at the earliest possible date.

REVIEW OF RECENT SUPREME COURT DECISIONS

Review by Mandamus—Authority of Municipalities to Make Binding Contracts for Maximum Rates—Rent Regulation Cases—The Sherman Act and Maintenance of Resale Prices—"Invested Capital" in War Excess Profits Tax

By Edgar Bronson Tolman

Practice.—Review by Mandamus

Re Matthew Addy Steamship & Commerce Corporation, Adv. Ops. p. 598.

An original petition was filed for a mandamus directing the District Judge, Eastern District Virginia, to vacate an order remanding a cause to the State Court, whence it had been removed. On rule to show cause, the judge made return that mandamus was not a proper remedy because of the provisions of Sec. 28 Judicial code concerning the remandment to state courts of cases improperly removed that

> such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

Mr. Justice Clarke delivered the opinion of the court and showed that the very point in issue had been decided more than thirty years ago and the decision constantly adhered to. The case merits review here, because of its quotations from Re Penn. Co. (137 U. S. 451) and its approval of the reasoning of Mr. Justice Bradley in that case, boldly departing from the mere letter of the law, and supplementing the literal words of the statute by an additional prohibition, not expressed, but necessarily implied in order to accomplish the evident purpose of the act:

> In terms, it only abolishes appeals and writs of error, it is true, and does not mention writs of mandamus; and it is unquestionably a general rule that the abrogation of one remedy does not affect another. But in this case we think it was the intention of Congress to make the judgment of the circuit court, remanding a cause to the state court, final and conclusive . . . The abrogation of the writ of error and appeal would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court . . . Although the writ of mandamus is not mentioned in the section, yet the use of the words "such remand shall be immediately carried into execution," in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy, by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus, as well as that of appeal and writ of error.

After citing and reviewing numerous decisions, all of which were in harmony with the case first cited, the court says:

> The conflict of opinion in the lower courts with respect to the right of removal from a state court of a case in which the opposing parties are citizens of different states, and neither is a resident of the state in which the case is commenced, is much to be regretted; but Section 28 of the Judicial Code is controlling, and Congress alone has power to afford relief.

Of course the meaning of the court here is, not that there is no remedy for the conflict of opinion save by congressional action, because **refusal** to remand in such a case might present a reviewable question, but the meaning is that this regrettable conflict of opinion does not justify the Supreme Court in taking jurisdiction to review by mandamus what Congress has declared "shall be immediately carried into execution."

Argued by Mr. T. K. Schmuck for petitioner and by Messrs. Edward R. Baird, Jr., and Gilbert R. Swink for respondent.

Rate Regulation—Authority of Municipalities to Make Binding Contracts for Maximum Rates

Southern Iowa Electric Co. v. City of Chariton, et al and two other cases, Adv. Ops. p. 514.

The appellants, three public utility corporations, operating in Iowa cities, had franchises, conferred by municipal ordinances, to use the streets, one for twenty years and two others for twenty-five years. The ordinances contained a schedule of maximum rates. After they had been in effect a few years, suits were begun against the cities to prevent the enforcement of these maximum rates, on the ground that they were so low as to be confiscatory. The District Court for the Southern District of Iowa granted a temporary injunction restraining enforcement of the maximum rates and allowed an order permitting a higher charge pending suit.

The cases were submitted upon the pleadings, and without the taking of testimony, upon issues which presented the contention that the ordinances were contracts and, therefore, the maximum rates could be enforced against the corporations, even though they were confiscatory. The lower court adopted the view that the ordinances were enforceable contracts, entered decrees enforcing the rates, and these decrees came before the United States Supreme Court for review on appeal.

Mr. Chief Justice White delivered the opinion of the court and, after reviewing the facts as presented by the record and stating the questions at issue, he said:

> Two propositions are indisputable: (a) That although the governmental agencies having authority to deal with the subject may fix and enforce reasonable rates to be paid public utility corporations for the services by them rendered, that power does not include the right to fix rates which are so low as to be confiscatory of the property of such corporations. (Citing Reagan v. Farmers' Loan & T. Co., 154 U. S. 362 and many other cases.) . . . and (b) that where, however, the public service corporations and the governmental agencies dealing with them have power to contract as to rates, and exert that power by fixing by contract rates to govern during a particular time, the enforcement of such rates is controlled by the obligation resulting from the contract, and therefore the question of whether such rates are confiscatory becomes immaterial. (Citing Freeport Water Co. v. Freeport, 180 U. S. 587, 593, and many other cases.)

From these two propositions and the cases supporting them, the Chief Justice deduced the conclusion that, since the rates in question were conceded to be confiscatory, they could not be enforced unless they were secured by contract obligation, and that the solution of this question turned first on the power of the

parties to contract on the subject; second, if they had such power, whether they exercised it. He assumed for the sake of the argument that the public service corporation had the contractual power to enter into the contracts in question and stated that the real issue was whether the municipal corporations under the law of Iowa had such authority.

The statute in question was Sec. 725 of the Code of 1897, which provided that municipal corporations should have the power to require every individual and private corporation operating gas, water, light or power to furnish service at rates fixed by the municipalities and that these powers *should not be abridged by ordinance, resolution or contract.* From the decision of the Supreme Court of Iowa, in Woodward v. Iowa R. & Light Co. (178 N. W. 549) he quoted with approval as follows:

> It will be noted from the foregoing that the legislative power to fix rates is conferred by this section upon the city council. The legislative power thus conferred is a continuing one, and may not be abridged or bartered away by contract or otherwise . . . By the revision and codification of 1897 the right of contract as to rates for utilities of this character was entirely eliminated, and the legislative power to regulate rates was conferred upon the city council in all cases. The reason for the change of method is obvious enough. Under the contract method, the rights of the public were often bartered away, either ignorantly or corruptly, and utility corporations became empowered through the contractual obligations to enforce extortionate rates. The net result of the progressive legislation is found in our present Sec. 725, whereby it is forbidden to any existing city council to bind the city to any rate for any future time. The power of regulating the rate is always in the present city council. It must be said, therefore, that the rates fixed by Sec. 6 of the ordinance hereinbefore referred to were not fixed by contract.

The Chief Justice quoted from many other cases in which the Supreme Court of Iowa had reaffirmed the doctrine that the continuing power and duty of municipalities to fix rates was inconsistent with the making of any contract concerning the rates for the future, and held that rates so fixed were always subject to review and concluded the opinion in the following words:

> The total want of power of the municipalities here in question to contract for rates, which is thus established, and the state public policy upon which the prohibition against the existence of such authority rests, absolutely exclude the existence of the right to enforce, as the result of the obligation of a contract, the concededly confiscatory rates which are involved, and therefore conclusively demonstrate the error committed below in enforcing such rates upon the theory of the existence of contract. And, indeed, the necessity for this conclusion becomes doubly manifest when it is borne in mind that the right here asserted to contract in derogation of the state law and of the rule of public policy announced by the court of last resort of the state, is urged by municipal corporations whose every power depends upon the state law.

The decrees were reversed and the causes remanded for further proceedings in conformity with the opinion. The case was argued by Messrs. Emmet Tinley, John A. Reed and William Chamberlain for appellants and by Messrs. Kridelbaugh and Munro for certain appellees.

San Antonio v. San Antonio Public Service Co., Adv. Ops. p. 518.

The San Antonio Public Service Co. acquired the rights and privileges of four other companies which had franchises for the operation of a street railway and the furnishing of gas and electricity for light and power. In the ordinance grants, there was a provision that the street railway companies should charge a 5 cent fare for one continuous ride over any of their lines with one transfer, and the general ordinances and penal code of the city forbade the charging of more than a 5 cent fare. In 1918 the Public Service Company applied to the city for permission to increase its rate of fare from 5 to 6 cents, on the ground that the 5 cent fare had become wholly insufficient to remunerate the company for the expenses of operation and, if continued, would amount to a confiscation of the property of the company. After a hearing, the city, by an ordinance reciting that the company was bound by a forty year franchise granted in 1899 to charge only a 5 cent fare, refused to make the increase. The company thereupon filed a bill to enjoin the city from enforcing such fare on the ground that it was a confiscatory rate. On reference to a Master there was a finding that the rate prescribed by the ordinance was insufficient because of the changed conditions since the rate was fixed 20 years ago, but the Master held that a rate reasonable when fixed does not become unreasonable from the judicial point of view because of changed conditions, and that to enjoin the interference with a higher rate by the company would be to exercise a power which courts do not possess. When the Master's report came before the court it was held that the court had jurisdiction to prevent the admitted confiscation which would result from the 5 cent rate, but that, as the court was not a primary rate making authority, it would not fix a reasonable rate to replace the 5 cent rate, the enforcement of which would be enjoined, but that it would postpone shaping the final decree for that purpose, expressing the hope that the parties might agree upon such a rate. Later a final decree was entered substituting a 7 cent rate for the 5 cent rate and enjoining the city from enforcing the various ordinances complained of in the bill prohibiting and punishing the charging of a higher rate than 5 cents, but the decree reserved the right to the city to ask relief, whenever, because of a change in conditions, a 5 cent fare should cease to be confiscatory.

The opinion was delivered by Mr. Chief Justice White and after reviewing the facts and the record as above outlined, he said:

> That, in view of the admited fact of confiscation, the court had power to deal with the subject, we are of opinion is too clear for anything but statement. And we think it is equally clear that as the right to regulate gave no power whatever to violate the Constitution by enforcing a confiscatory rate,—a result which could only be sustained as a consequence of the duty to pay such rate arising from the obligations of a contract,—it follows that the solitary question to be considered is whether a contract existed empowering the city to enforce the confiscatory rate.

Following the line of reasoning which the Chief Justice had announced in the Southern Iowa Electric Co. v. Chariton, *supra,* he held that there was no contract fixing a 5 cent rate because of the provision of the State Constitution prohibiting "any irrevocable or uncontrollable grant of special privileges." The Constitution was amended in 1912 so as to give municipalities authority broad enough to enable them to contract as to the rates of fare to be charged, but the Chief Justice pointed out that no contract was made between the city and the traction company after the constitutional amendment in 1912 and that the amendment was therefore irrelevant to the cause under consideration. In reply to the suggestions made in argument that a contract might be inferred from the

relation of the parties and from the granting of the franchise, which if not binding on the municipality, was binding on the company, as a unilateral obligation to be inferred as a consequence of the acceptance of the grant, the Chief Justice said:

> The bold contrast between the ordinance referred to and the statement made by the city in the ordinance refusing the increase in rate to meet the confiscation, because of the assumed restraint put by an existing contract, tends to throw abundant light on the situation. The fact is, that all the contentions of the city as to implication of contract as to the 1899 rates but illustrate the plainly erroneous theory upon which the entire argument for the city proceeds; that is, that limitations by contract upon the power of government to regulate the rates to be charged by a public service corporation are to be implied for the purpose of sustaining the confiscation of private property.

The case was argued by Mr. R. J. McMillin for appellants and Mr. S. J. Brooks for appellee.

The Rent Regulation Cases

Julius Block v. Louis Hirsh, Adv. Ops. p. 531.

One Louis Hirsh bought a building in Washington while the lease to the first floor and cellar to one Julius Block was running, and notified him that he should require possession when the lease expired. Block declined to surrender the premises and Hirsh brought suit in the Supreme Court of the District to recover possession. Block relied upon the act of October 22, 1919, Chapter 80 title 2, "District of Columbia rents;" especially Section 109 which provided that the right of a tenant to occupy any hotel, apartment or "rental property" was to continue, notwithstanding the expiration of his term, at the option of the tenant, subject to regulation by the commission appointed by the Act, so long as he paid the rent and performed the conditions as fixed by the lease, or as modified by the commission. The same section provided that the owner might have the possession of such property for actual and bona fide occupancy by himself, or his wife, children or dependents upon giving thirty days' notice in writing. The Act further declared (Sec. 122) that the provisions above cited were made necessary by emergencies growing out of the war, and as emergency legislation they are to end in two years unless sooner repealed.

According to his affidavit, Hirsh wanted the premises for his own use but did not see fit to give the thirty days' notice because he denied the validity of the "Rent" Act. The Supreme Court of the District rendered judgment in favor of Hirsh, and the Court of Appeals of the District affirmed the judgment on the ground that the Statute was "an attempt to authorize the taking of property not for public use, and without due process of law, and for this and other reasons void." The case came before the United States Supreme Court on a writ of error to the Court of Appeals of the District.

Mr. Justice Holmes delivered the prevailing opinion. With regard to the emergency, the learned Justice said:

> No doubt it is true that a legislative declaration of facts that are material only as the ground for enacting a rule of law, for instance, that a certain use is a public one, may not be held conclusive by the courts. (Citing many cases) . . . But a declaration by a legislature concerning public conditions that, by necessity and duty, it must know, is entitled at least to great respect. In this instance Congress stated a publicly notorious and almost world-wide fact. That the emergency declared by the statute did exist must be assumed, and the question is whether Congress was incompetent to meet it in the way in which it has been met by most of the civilized countries of the world.
>
> The general proposition to be maintained is that circumstances have clothed the letting of buildings in the District of Columbia with a public interest so great as to justify regulation by law. Plainly, circumstances may so change in time or so differ in space as to clothe with such an interest what at other times or in other places would be a matter of purely private concern.

In support of this general proposition Mr. Justice Holmes referred to the application of this doctrine to insurance, irrigation and mining cases. As an illustration of the different tests which have been applied to the ascertainment of public interest and that public interest may extend to the use of land, he said:

> The fact that tangible property is also visible tends to give a rigidity to our conception of our rights in it that we do not attach to others less concretely clothed. But the notion that the former are exempt from the legislative modification required from time to time in civilized life is contradicted not only by the doctrine of eminent domain, under which what is taken is paid for, but by that of the police power in its proper sense, under which property rights may be cut down, and to that extent taken, without pay.

In support of this doctrine the learned Justice cited decisions which sustained the right under the police power to limit the height of buildings, to require safe pillars to be left in coal mines, to regulate billboards in cities and to preserve the timber on watersheds, and said:

> These cases are enough to establish that a public exigency will justify the legislature in restricting property rights in land to a certain extent without compensation. But if, to answer one need, the legislature may limit height, to answer another it may limit rent. We do not perceive any reason for denying the justification held good in the foregoing cases to a law limiting the property rights now in question if the public exigency requires that. The reasons are of a different nature, but they certainly are not less pressing. Congress has stated the unquestionable embarrassment of government and danger to the public health in the existing condition of things. The space in Washington is necessarily monopolized in comparatively few hands, and letting portions of it is as much a business as any other. Housing is a necessary of life. All the elements of a public interest justifying some degree of public control are present. The only matter that seems to us open to debate is whether the statute goes too far. For just as there comes a point at which the police power ceases and leaves only that of eminent domain, it may be conceded that regulations of the present sort, pressed to a certain height, might amount to a taking without due process of law. . . .
>
> The main point against the law is that tenants are allowed to remain in possession at the same rent that they have been paying, unless modified by the commission established by the act, and that thus the use of the land and the right of the owner to do what he will with his own and to make what contracts he pleases are cut down. But if the public interest be established, the regulation of rates is one of the first forms in which it is asserted, and the validity of such regulation has been settled since Munn v. Illinois, 94 U. S. 113. . . . The regulation is put and justified only as a temporary measure. . . . A limit in time, to tide over a passing trouble, well may justify a law that could not be upheld as a permanent change.
>
> Machinery is provided to secure to the landlord a reasonable rent. (Sec. 106.) It may be assumed that the interpretation of "reasonable" will deprive him, in part, at least, of the power of profiting by the sudden influx of people to Washington, caused by the needs of government and the war, and thus of a right usually incident to fortunately situated property,—of a part of the value of his property as defined in International Harvester Co. v. Kentucky, 234 U. S. 222 . . . Southern R. Co. v. Greene, 216 U. S. 400, 414. . . . But while it is unjust to pursue such profits from a national misfortune with sweeping denunciations, the policy of restricting them has been embodied in taxation and is accepted. It goes little if at all farther than the restriction put upon the rights of the

owner of money by the more debatable usury laws. The preference given to the tenant in possession is an almost necessary incident of the policy, and is traditional in English law. If the tenant remained subject to the landlord's power to evict, the attempt to limit the landlord's demands would fail.

Assuming that the end in view otherwise justified the means adopted by Congress, we have no concern, of course, with the question whether those means were the wisest, whether they may not cost more than they come to, or will effect the result desired. It is enough that we are not warranted in saying that legislation that has been resorted to for the same purpose all over the world is futile, or has no reasonable relation to the relief sought. . . .

The statute is objected to on the further ground that landlords and tenants are deprived by it of a trial by jury on the right to possession of the land. If the power of the commission established by the statute to regulate the relation is established, as we think it is, by what we have said, this objection amounts to little. To regulate the relation and to decide the facts affecting it are hardly separable. While the act is in force there is little to decide except whether the rent allowed is reasonable, and upon that question the courts are given the last word. A part of the exigency is to secure a speedy and summary administration of the law, and we are not prepared to say that the suspension of ordinary remedies was not a reasonable provision of a statute reasonable in its aim and intent. The plaintiff obtained a judgment on the ground that the statute was void, root and branch. That judgment must be reversed.

Mr. Justice McKenna delivered the dissenting opinion and with him concurred the Chief Justice, Mr. Justice Van Devanter and Mr. Justice McReynolds. The learned Justice at the outset of his opinion says:

> The grounds of dissent are the explicit provisions of the Constitution of the United States; the specifications of the grounds are the irresistible deductions from those provisions, and, we think, would require no expression but for the opposition of those whose judgments challenge attention.

The provisions of the Constitution to which the learned Justice refers are the 5th and 14th Amendments whereby the national government and the States respectively are forbidden to deprive any person of "life, liberty or property withoue due process of law" and by which private property cannot be "taken for public use without just compensation," and there is an assignment to Sec. 10 of Article 1 that no State shall pass any law impairing the obligation of contracts. The purpose of the statute involved is declared to be

> to permit a lessee to continue in possession of leased premises after the expiration of his term, against the demand of his landlord, and in direct opposition to the covenants of the lease, so long as he pays the rent and performs the conditions as fixed by the lease, or as modified by a commission created by the statute. This is contrary to every conception of leases that the world has ever entertained, and of the reciprocal rights and obligations of lessor and lessee.

In reply to the argument of necessity by conditions resulting from the war, Mr. Justice McKenna said:

> The thought instantly comes that the country has had other wars with resulting embarrassments, yet they did not induce the relaxation of constitutional requirements nor the exercise of arbitrary power. Constitutional restraints were increased, not diminished.

He admitted that the conditions presented a problem and induced an appeal for government remedy, but asserted that the Constitution was deliberately made as a restraint upon government and that the sum of these restraints were rights of the government; that the careful adjustment of power and rights made the Constitution a real charter of liberty, deserving the praise given it as "the most wonderful work struck off at any given time by the brain and purpose of man," and he added that more than a century of time "has certainly proven the sagacity of the constructors, and the stubborn strength of the fabric." He said:

> The "strength of the fabric" cannot be assigned to any one provision; it is the contribution of all; and therefore, it is not the expression of too much anxiety to declare that a violation of any of its prohibitions is an evil,—an evil in the circumstances of violation, of greater evil because of its example and malign instruction. And against the first step to it this court has warned, expressing a maxim of experience,—"Withstand beginnings." Boyd v. United States, 116 U. S. 616, 635.

The learned dissenting Justice expresses himself without reserve in regard to the occasion for and effect of the legislation in question. He asks why the federal government and the state government of New York exercise the police power to determine who shall occupy the premises involved in the cases before the court, and declares that the answer is "to supply homes to the homeless," to which supposed answer he says:

> It does not satisfy. If the statute keeps a tenant in, it keeps a tenant out; indeed, this is its assumption. . . . And this, it is the view of the opinion, has justification because "space in Washington is limited" and "housing is a necessary of life." A causative and remedial relation in the circumstances we are unable to see. . . .
>
> If such exercise of government be legal, what exercise of government is illegal? Houses are a necessary of life, but other things are as necessary. May they, too, be taken from the direction of their owners and disposed of by the government? Who supplies them, and upon what inducement? And, when supplied, may those who get them under promise of return, and who had no hand or expense in their supply, dictate the terms of retention or use, and be bound by no agreement concerning them?
>
> An affirmative answer seems to be the requirement of the decision . . . if the public interest can extend a lease, it can compel a lease; the difference is only in degree and boldness. In one as much as in the other, there is a violation of the positive and absolute right of the owner of the property. And it would seem, necessarily, if either can be done, unoccupied houses or unoccupied space in occupied houses can be appropriated. The efficacy of either to afford homes for the homeless cannot be disputed. . . .
>
> The prospect expands and dismays when we pass outside of considerations applicable to the local and narrow conditions in the District of Columbia. . . . A New York statute is submitted to us, and counsel have referred to the legislation of six other states. And there is intimation in the opinion that Congress, in its enactment, has imitated the laws of other countries. The facts are significant and suggest the inquiry, Have conditions come not only to the District of Columbia, embarrassing the Federal government, but to the world as well, that are not amenable to passing palliatives, and that socialism, or some form of socialism, is the only permanent corrective or accomodation? . . . The inquiry occurs, Have we come to the realization of the observation that "war, unless it be fought for liberty, is the most deadly enemy of liberty?"

Returning to the Constitution the learned Justice again laid emphasis upon the fact that its words were deliberately intended as a restraint upon the government and upon the people themselves and that this restraint was deemed necessary for the protection of the individual and he inquires:

> Has it suddenly become weak . . . Has it become an anachronism, and is it to become "an archaeological relic," no longer to be an efficient factor in affairs, but something only to engage and entertain the studies of antiquarians? Is not this to be dreaded—indeed, will it not

be the inevitable consequence of the decision just rendered?

He again calls attention to Article 1, Section 10, providing that no state shall pass any law impairing the obligation of contracts, and to the 5th Amendment which declares that no person can be deprived of property without due process of law, and says:

> The prohibitions need no strengthening comment. They are as absolute as axioms. A contract existing, its obligation is impregnable . . . The present case is concerned with a lease, and that a lease is a contract we do not pause to demonstrate either to lawyers or to laymen . . . .
>
> It is manifest, therefore, that by the statute the government interposes with its power to annul the covenants of a contract between two of its citizens, and to transfer the uses of the property of one and vest them in the other. The interposition of a commission is but a detail in the power exerted,—not extenuating it in any legal sense. Indeed, intensifies its illegality,—takes away the right to a jury trial from any dispute of fact.
>
> If such power exist, what is its limit and what its consequences?

The irreconcilable conflict of opinion between the majority and minority of the court is manifested by the statement:

> There is not a contention made in this case that this court has not pronounced untenable.

Referring to the fact that the police power is invoked, he says:

> It embraces power over everything under the sun, and the line that separates its legal from its illegal operation cannot be easily drawn. But it must be drawn. To borrow the illustration of another, the line that separates day from night cannot be easily discerned or traced, yet the light of day and the darkness of night are very distinct things. And as distinct in our judgment is the puissance of the Constitution over all other ordinances of power, and as distinct are the cited cases from this case; and if they can bear the extent put upon them, what extent can be put upon the case at bar or upon the limit of the principle it declares?

He declares that the assertion that legislation can regard a private transaction as a matter of public interest, is an assertion of the possession of the most unfounded and irresponsible power which it is possible to express; that the admission of the majority opinion that the legislative declaration of such public interest is not conclusive, is not reassuring, because it is set forth and defined as a power of government and, if it exists at all, it must be perennial and universal, and there is no power which can pronounce the limit of its duration; and that the justification of such a power practically marks the doom of judicial judgment on legislative action.

As an example of the grave consequences which may follow from the doctrine of legislative power to impair contractual obligation under the plea of an overriding public interest he says:

> The wonder comes to us, what will the country do with its new freedom? Contracts and the obligation of contracts are the basis of life and of all its business, and the Constitution, fortifying the conventions of honor, is their conserving power. Who can foretell the consequences of its destruction, or even question it?

He then refers to the contracts made by the national government, for the issuance of war loan bonds, with the express covenant that the income therefrom should to a specified extent be free from taxation, and asks what answer is to be made if legislation should be passed depriving such bonds of the exemption provision:

> Their promises are as much within the principle as the lease of Hirsh is; for necessarily, if one contract can be disregarded in the public interest, every contract can be; patriotic honor may be involved in one more than in another, but degrees of honor may not be attended to,—the public interest regarded as paramount. At any rate, does not the decision just delivered cause a dread of such result, and take away assurance of security and value from the contracts and their evidences? . . .

In conclusion he says:

> This court has at times been forced to declare particular state laws void for their attempted impairment of the obligation of contracts. To accusations hereafter of such an effect of a state law this decision will be opposed, and the conception of the public interest. . . .
>
> Under the decision just announced, if one provision of the Constitution may be subordinated to that power, may not other provisions be? At any rate, the case commits the country to controversies, and their decision, whether for the supremacy of the Constitution or the supremacy of the power of the states, will depend upon the uncertainty of judicial judgment.

The case was argued by Mr. Jesse C. Adkins for the plaintiff in error, by Mr. William G. Johnson for the defendant in error, and by Special Assistant Attorney General Glassie for the United States as *amicus curiae*.

Marcus Brown Holding Company v. Marcus Feldman, et al, Adv. Op. p. 539.

Appellants, who were the owners of a large apartment house in the City of New York, brought a bill in equity in the U. S. District Court for the Southern District of New York against the tenants of an apartment in the house and the District Attorney of the County of New York. The tenants were holding over after their lease had expired, claiming the right to do so under Chapters 942 and 947 of the laws of New York of 1920, in which a public emergency is declared and wherein (Chap. 947) it is further provided that no action "shall be maintainable to recover the possession of real property in a city of a population of one million or more, or in a city in a county adjoining such city, occupied for dwelling purposes, except in an action to recover such possession upon the ground that the person is holding over and is objectionable . . . or an action where the owner of record of the building, being a natural person, seeks in good faith to recover the possession of the same or a room or rooms therein for the immediate and personal occupancy by himself and his family as a dwelling; or an action to recover premises for the purpose of demolishing the same with the intention of constructing a new building. . . ." The object of the bill was to have these and other connected laws declared unconstitutional.

The District Attorney was joined to prevent his enforcing, by criminal proceedings, chapters 131 and 951 of the Acts of the same year, which make it a misdemeanor for the lessor or any agent or janitor intentionally to fail to furnish such water, heat, light, elevator, telephone, or other services as may be required by the terms of the lease and necessary in the proper or customary use of the building.

The bill alleged at length the rights given to a lessor by the common law and statutes of New York before the enactment of the statutes relied upon by the tenants, a covenant by the latter to surrender at the termination of their lease, and due demand, and claimed protection under article 1, section 10 of the Constitution, forbidding any law impairing the obligation of contracts, and the Fourteenth Amendment of that instrument. An affidavit alleged that before the passage of the new statute another lease of the premises had been made to go into effect on October

1, 1920, the day after the expiration of the lease of the present tenants. The tenants answered, relying upon the new statutes and alleging their willingness to pay a reasonable rent and any reasonable increase, as the same might be determined by a court of competent jurisdiction. The District Attorney moved to dismiss. The District Court considered the case upon the merits, upheld the laws as constitutional, and ordered the bill dismissed; whereupon an appeal was taken to the Supreme Court of the United States.

This case was argued with the case of Block v. Hirsh *supra* and involves the same questions discussed in that case. The prevailing opinion in this case also was delivered by Mr. Justice Holmes who, after stating the facts set up in the bill and the substance of the statutes involved, said:

> The chief objections to these acts have been dealt with in Block v. Hirsh, supra. In the present case more emphasis is laid upon the impairment of the obligation of the contract of the lessees to surrender possession, and of the new lease, which was to have gone into effect upon October 1, last year. But contracts are made subject to this exercise of the power of the state when otherwise justified, as we have held this to be. (Citing many cases.)

To the argument that the laws discriminate in respect of the cities affected and the character of the buildings, he said:

> It is said, too, that the laws are discriminating, in respect of the cities affected and the character of the buildings, the laws not extending to buildings occupied for business purposes, hotel property, or buildings now in course of erection, etc. But, as the evil to be met was a very pressing want of shelter in certain crowded centers, the classification was too obviously justified to need explanation, beyond repeating what was said below as to new buildings, that the unknown cost of completing them and the need to encourage such structures sufficiently explain the last item on the excepted list.

In answer to the objection that chapter 951 of the New York Act in so far as it required active services to be rendered to the tenants is void as infringing the 13th Amendment, he said:

> It is true that the traditions of our law are opposed to compelling a man to perform strictly personal services against his will, even when he has contracted to render them. But the services in question, although involving some activities, are so far from personal that they constitute the universal and necessary incidents of modern apartment houses. They are analogous to the services that, in the old law, might issue out of or be attached to land. We perceive no additional difficulties in this statute, if applicable as assumed. The whole case was well discussed below, and we are of opinion that the decree should be affirmed.

In this case also Mr. Justice McKenna delivered the dissenting opinion in which the Chief Justice, Mr. Justice Van Devanter, and Mr. Justice McReynolds concurred. The cases cited in the prevailing opinion were not reviewed but it was said:

> There is not a line in any of them that declares that the explicit and definite convenants of private individuals engaged in a private and personal matter are subject to impairment by a state law, and we submit, as we argued in the Hirsh Case, that if the state have such power—if its power is superior to article 1, section 10, and the 14th Amendment—it is superior to every other limitation upon every power expressed in the Constitution of the United States. . . .
>
> It is safer, saner, and more consonant with constitutional pre-eminence and its purposes, to regard the declaration of the Constitution as paramount, and not to weaken it by refined dialectics, or bend it to some impulse or emergency "because of some accidents of immediate overwhelming interest which appeals to the feelings, and distorts judgment."

The case was argued by Mr. Joseph A. Seidman for appellant, by Mr. David L. Podell for appellees, and by Mr. William D. Guthrie as *amicus curiae*.

Sherman Act—Maintenance of Prices on Resale

Frey & Son, Incorporated, v. Cudahy Packing Company, Adv. Ops. page 523.

Plaintiff in error brought suit against the Packing Company in the District Court of the District of Maryland for threefold damages under the Sherman Act, alleging the existence of an unlawful contract, combination or conspiracy between the Packing Company, manufacturers of "Old Dutch Cleanser," and various jobbers for the maintenance of resale prices. The case was submitted to the jury for determination under an elaborate charge, a part of which was to the effect that

> If you shall find that the defendant indicated a sales plan to the wholesalers and jobbers, which plan fixed the price below which the wholesalers and jobbers were not to sell to retailers, and you find defendant called this particular feature of this plan to their attention on very many different occasions, and you find the great majority of them not only expressing no dissent from such plan, but actually co-operating in carrying it out, by themselves selling at the prices named, you may reasonably find from such fact that there was an agreement or combination forbidden by the Sherman Anti-trust Act.

The jury found for the plaintiff, and the United States Circuit Court of Appeals for the Fourth Circuit reversed the decision on the ground that there was no formal, written, or oral agreement with jobbers for the maintenance of prices and that, considering the doctrine approved in the Colgate case (250 U. S. 300), the District Court should have directed a verdict for defendants. The plaintiff in error thereupon reserved its right of review, waived a new trial and consented to entry of final judgment for the Packing Company. The judgment was then brought for review to the Supreme Court of the United States by writ of error.

Mr. Justice McReynolds delivered the opinion of the court and in regard to the view of the Colgate case taken by the Court of Appeals the learned Justice said:

> It is unnecessary to repeat what we said in United States v. Colgate & Co. and United States v. A. Schrader's Son. Apparently the former case was misapprehended. The latter opinion distinctly stated that the essential agreement, combination, or conspiracy might be implied from a course of dealing or other circumstances. Having regard to the course of dealing and all other pertinent facts disclosed by the present record, we think whether there existed an unlawful combination or agreement between the manufacturer and jobbers was a question for the jury to decide, and that the circuit court of appeals erred when it held otherwise.

But the learned Justice concurred with the Circuit Court of Appeals that the charge was erroneous and that the facts recited in the charge, standing alone, did not suffice to establish an agreement or combination forbidden by the Sherman Act and on this ground the decision of the Circuit Court of Appeals was affirmed.

Mr. Justice Pitney delivered the dissenting opinion, in which concurred Mr. Justice Day and Mr. Justice Clarke. The point of dissent is shown by the following excerpts:

> I agree with the court that the circuit court of appeals misapprehended the effect of our decision in the case cited, and that, under rules laid down in Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U. S. 373, 399, 400, 408, and United States v. A. Schrader's Sons, 252 U. S. 85, 99 . . . the trial judge was right in submitting the case to the jury.
>
> Notwithstanding its conclusions that the court of appeals erred in holding that a verdict ought to have

been directed in favor of defendant, the majority holds that the judgment under review here ought to be affirmed, because of supposed error in an instruction given to the jury (a new trial having been waived by plaintiff on consenting to entry of final judgment for the Packing Company by the circuit court of appeals under the practice followed in Thomson v. Cayser, 243 U. S. 66, 83, 61 L. Ed. 597, 605, 37 Sup. Ct. Rep. 353, Ann. Cas. 1917D, 322).

The learned Justice reviews the evidence as to the sales plan of the plaintiff, analyzes that part of the charge above set out on which the question turns, and says:

> Passing for the moment the question whether this was legally erroneous, I am unable to find in the record any basis for attributing error to the trial judge in respect to it, because it was not made the subject of any proper exception. The trial was litigiously contested, defendant having taken no less than 157 exceptions, of which 20 were directed to the charge given to the jury. Among them, however, I can find none that challenges the proposition embodied in the instruction now held to be erroneous, recites either the words or the substance of that instruction, or otherwise fairly identifies it so as to bring it to the attention of the trial judge.

The learned dissenting Justice follows with a discussion of the rules which govern exceptions and the principles on which such rules are based which we have here no available space to reproduce, but which is well worth reading.

Passing then from the question of practice to the instruction itself, he said:

> But, were the instruction duly excepted to, I am unable to assent to the view that it was erroneous. . . .
>
> Reading the criticized instruction in the light of the other parts of the charge, it amounted to no more than telling the jury that if defendant had a sales plan that, if assented to and carried into effect, would constitute a fixing of prices in restraint of interstate trade and commerce, and the particulars of this plan were repeatedly communicated by defendant to the many wholesalers and jobbers with whom it had relations, and if the great majority of them not only did not express dissent from the plan, but actually co-operated in carrying it out by themselves adhering to its details, the jury reasonably might infer that they did mutually give assent to the plan, equivalent to an agreement or combination to pursue it. In short, that, upon finding many persons, actuated by a common motive, exchanging communications between themselves respecting a plan of conduct, and acting in concert in precise accordance with the plan, the jury might find that they had agreed or combined to act as in fact they did act; that their simultaneous pursuit of an identical program was not a miraculous coincidence, but was the result of an agreement or combination to act together for a common end.

The learned Justice calls attention to the fact that the opinion states no ground upon which the instruction is held to be erroneous and that the elaborate brief of the packing company specified no criticism upon it; that he found nothing in the Colgate case to support the criticism of the judge's instructions; and he cited many other cases brought under the Sherman Law where the evidence of concerted action seemed to him to be no stronger than in the instant case and where liability under the Act had been sustained, and in conclusion said:

> Convinced that the ruling now made, if adhered to, will seriously hamper the courts of the United States in carrying into effect the prohibitions of Congress against combinations in restraint of interstate trade, I respectfully dissent from the opinion and judgment of the court.

The decision of the Circuit Court of Appeals in this case was after the decision in the Colgate case and before the decision in the Schrader case. Notwithstanding the dissent expressed in this case, the practitioner who desires to know the present state of the law with regard to the maintenance of prices (for unpatented articles) on resale will find, after a study of the cases above referred to in the light of the opinion in this case, that there is no real uncertainty about the law.

The case was urged by Mr. Horace T. Smith and Mr. Charles Markell for the plaintiff in error, and by Mr. Gilbert H. Montague for the Packing Company.

Taxation—War Excess Profits Tax—Invested Capital

LaBelle Iron Works v. *U. S.*, Adv. Ops. p. 604.

In this case, an appeal from the judgment of the Court of Claims presented for review the interpretation of the term "Invested Capital" as used in the war excess profits tax.

The facts stated in the petition were admitted by demurrer and in brief outline were as follows:

Appellant prior to 1904 purchased for $190,000 certain ore lands, which in 1912, after extensive exploration and development (the cost of which is not stated) had a fair cash value of not less than $10,105,400. In that year because of such appreciation in the value of its lands, appellant added $10,000,000 to the inventory value of its property on its books, carried said sum into its surplus and distributed such surplus ratably by means of a stock dividend. This was effectuated by the surrender and cancellation of all prior outstanding stock and the exchange of one share of common and one of preferred for each original share.

After all of these transactions had been fully consummated came the Revenue Act of 1917. Title 2 of this act imposed a graduated tax upon that portion of the income for 1917 and subsequent years, which should be in excess of the average rate of income during the pre-war period of 1911, 1912 and 1913, to be computed (for domestic corporations) as follows: The total income for the taxable year was first ascertained and from this total sum was to be deducted an amount equal to the same percentage of the invested capital for the taxable year as the average percentage of the income on the invested capital during said pre-war period. There were limitations, exceptions and deductions not necessary here to be stated because the whole case turned on the interpretation of the term "invested capital," as defined in Sec. 207 of the Act.

In its annual net income return for the year 1917 the company included in the total of its invested capital the full fair cash value of its ore lands, but the Commissioner of Internal Revenue reassessed the invested capital, and valued the ore lands at their original cost, excluding all appreciation in the value thereof. The result was to increase the tax more than a million dollars, which having been paid was made the subject of a claim for refund. This claim was rejected by the commissioner, disallowed by the court of claims and this appeal followed.

Mr. Justice Pitney delivered the opinion of the court, and after setting out the facts, the substance of the applicable statutes and the contentions of the parties, said:

> Reading the entire language of Sec. 207 in the light of the circumstances that surrounded the passage of the act, we think its meanings as to "invested capital" is entirely clear.

Referring to the great stimulation of business and increase of profits after 1914 by reason of the demand for war supplies and other materials, and reviewing the legislation by which Congress met the financial demands incurred by our entry into the conflict in 1917,

he declared that the dominant purpose of Congress was to place the burden of this "war excess profits tax" upon the incomes in excess of normal reasonable returns on capital actually embarked.

> But if such capital were to be computed according to appreciated market values based upon the estimates of interested parties (on whose returns perforce the government must in great part rely), exaggerations would be at a premium, corrections difficult, and the tax easily evaded. Section 207 shows that Congress was fully alive to this and designedly adopted a term,—"invested capital,"—and a definition of it, that would measurably guard against inflated valuations. The word "invested" in itself imports a restrictive qualification . . . "to invest" imports a laying out of money, or money's worth. . . .
>
> In order to adhere to this restricted meaning and avoid exaggerated valuations, the draftsman of the act resorted to the test of including nothing but money, or money's worth, actually contributed or converted in exchange for shares of the capital stock, or actually acquired through the business activities of the corporation or partnership (involving again a conversion), and coming in ab extra, by way of increase over the original capital stock.

The learned Justice supports the proposition last quoted by an analysis of the section in detail and shows that none of the three numbered clauses into which the section is divided warrants the inclusion within the definition of "invested capital," of

> any marking up of the valuation of assets upon the books to correspond with increase in market value, or any paper transaction by which new shares are issued in exchange for old ones in the same corporation, but which is not in substance and effect a new acquisition of capital property by the company.

In answer to the argument that the appreciated value of the ore lands should be treated as earned surplus because it was the result of extensive exploration and development work, he said:

> We assume that a proper sum, not exceeding the cost of the work, might have been added to earned surplus on that account; but none such was stated in appellant's petition, nor, so far as it appears, in its return of income. In the absence of such a showing it was not improper to attribute the entire $9,915,400, added to the book value of the ore property in the year 1912, to a mere appreciation in the value of the property; in short, to what is commonly known as the "unearned increment," not properly "earned surplus" within the meaning of the statute.

Having thus disposed of the points raised as to the construction of the act, the learned Justice takes up the contention that if it be construed as contended by the government, the Act is unconstitutional. The objection as to alleged inequality is met by the unquestioned rule that "the only rule of uniformity prescribed with respect to duties imposts and excises laid by Congress is the territorial uniformity required by Art. 1, Sec. 8 and by the declaration

> that the statute under consideration operates with territorial uniformity, is obvious and not questioned.

The insistence that the act in basing "invested capital" on actual costs, to the exclusion of higher estimated values, is productive of arbitrary discrimination, is met as follows:

> The difficulty of adjusting any system of taxation so as to render it precisely equal in its bearing is proverbial, and such nicety is not even required of the states under the equal protection clause, much less of Congress under the more general requirement of due process of law in taxation. . . .
>
> The act treats all corporations and partnerships alike, so far as they are similarly circumstanced. As to one and all, Congress adjusted this tax, generally speaking, on the basis of excluding from its operation income to the extent of a specified percentage (7 to 9 per cent) of the capital employed, but upon condition that such capital be valued according to what actually was embarked at the outset or added thereafter, disregarding any appreciation in values. If in its application the tax in particular instances may seem to bear upon one corporation more than upon another, this is due to differences in their circumstances, not to any uncertainty or want of generality in the test applied. . . .
>
> The principal line of demarcation—that based upon actual costs, excluding estimated appreciation—finds reasonable support upon grounds of theory and practice. . . . There is a logical incongruity in entering upon the books of a corporation, as the capital value of property acquired for permanent employment in its business and still retained for that purpose, a sum corresponding not to its cost, but to what probably might be realized by sale in the market. It is not merely that the market value has not been realized or tested by sale made, but that sale cannot be made without abandoning the very purpose for which the property is held. . . . But certainly Congress, in seeking a general rule, reasonably might adopt the cost basis, resting upon experience rather than anticipation.

The position of the court is aptly illustrated by reference to the practice of corporations in distinguishing between different kinds of contributions to capital by allocating different kinds of securities with different priorities to different kinds of capital values, and the adoption of this practice by appellant:

> In the present case, for instance, when appellant took the estimated increase in value of its ore lands as a basis for increased capitalization, it issued preferred stock to the amount of the former total, carrying those lands at cost, and issued a like amount of common stock to represent the appreciation in their market value. . . . Upon like grounds, it was not unreasonable for Congress, in adjusting the "excess profits tax," to accord preferential treatment to capital representing actual investments, as compared with capital representing higher valuations based upon estimates, however confident and reliable, of what probably could be realized were the property sold instead of retained.

The judgment of the court of claims was affirmed.

The case was argued by Messrs. Charles E. Hughes and Charles McCamic for appellant and by Solicitor General Frierson for the government.

"The Court of St. James"—From a Layman

Philadelphia, Penn., June 30.—To the Editor: A few days ago, while in the office of my attorney in this city, I glanced through your JOURNAL for June. In the intensely interesting article, "The Status of Canada," by Mr. Justice Riddell, I notice the expression "Agent at the Court of St. James," in the first column of the article. Is this expression correct as it is printed? Does it not contain a typographical error? Should it not be "Court of St. James's"?

The Court derives its name from the Palace of St. James, which was erected by Henry VIII on the site of a hospital for lepers, long previously dedicated to St. James the Less, and which in the year 1532 the King appropriated to himself, retaining its dedicatory name of St. James for his new Palace. In the year 1837 Queen Victoria and her royal family moved to Buckingham Palace, but the English Court still continues to be known by its official appellation as "Court of St. James's."

We might say the Court of the Palace of St. James, or the Court of St. James's Palace, or, by abridgment, its official designation, "Court of St. James's," omitting the word Palace.

In speaking of St. Paul's Cathedral, we certainly should say the "Dean of St. Paul's," not "Dean of St. Paul"; and of St. George's Church, the "Rector of St. George's," not "Rector of St. George."—RICHARD GRENVILLE.

BUSINESS MANAGEMENT FOR LAW OFFICES

Committee of Illinois Bar Association Prepares Report Criticising Profession for Inadequate Business Methods and Presenting Various Suggestions for Improving System of Handling Business

THE report of the Committee on Office Management, made to the Illinois State Bar Association at its meeting in June, 1921, is a carefully prepared document and contains matter of much interest to the profession. It declares that lawyers are generally subject to indictment for "criminally negligent management of their offices." It emphasizes the present-day demand that the lawyer give service based on businesslike methods; insists that the study of business efficiency, which is so familiar now in other fields, may well be transferred to the legal profession; calls attention to the fact that the law is not only a learned profession, but also a pursuit which has a strictly business side that can only be neglected at the expense of the lawyer; outlines the elements involved in a comprehensive system for a large organization, and discusses various features common to both large and small law offices. The report concludes with a bibliography which is of value to those who care to peruse the literature on the subject. It does not pretend to be definitive, but concludes with a recommendation that systematic study be given to the subject and reports be made to the association each year. Mr. Roger Sherman of Chicago, Chairman, and the other members of the committee as well, are to be congratulated on their labors.

At the outset the committee calls attention to the fact that comparatively little study has been given to the subject when its importance is considered. Aside from the Illinois and Iowa Bar Associations, no other state association has taken it up for study or report. Twenty-one replied to an inquiry, that they had given it no consideration, and others either did not reply or stated they had given it casual consideration only. Of the nine largest law schools of the country three—Yale, Northwestern and Leland Stanford—report that they give any instruction at all on the subject. Law journals have printed articles from time to time but on the whole the sources of information are not extensive. All this in face of the fact, in the opinion of the committee, that more businesslike services from the lawyer are imperiously demanded. "Today, more than ever before," the report states, "the public demands 'service'. It must have results, not delays, not excuses, not explanations, but results."

It continues:

> While "Honesty is the best policy," system is a *necessity* to the progressive lawyer. If a lawyer has not developed a system that will enable him to give quick and satisfactory serivce, his clients will go to another lawyer who is better equipped. . . .
>
> From the client's point of view it means quick and effective results and profit or at least a saving to him; hence satisfaction with the lawyer, willingness to pay a fair fee, to recommend the lawyer to others, and to take future business to him. From the lawyer's point of view, it means time saved, results accomplished, an intelligent charge to the client, saving of wear and tear on the lawyer, and ability to do more business, to make more money and to get and keep more clients. . . .
>
> There is a demand for results. The legal profession must respond to that demand. In the *nisi prius* court the judge who is a good executive is more effective and renders better service to the community than the erudite judge who knows the theory of the law but lacks in executive ability and practical application of the law to concrete cases.
>
> Today the lawyer who is experienced in business matters has the call. Every lawyer should have a business training in and out of college. He constantly advises on business policies and frequently becomes the executive head of great enterprises. It may seriously be argued that the lawyers would better serve the public and themselves if they would abolish the old traditions of the profession and become business men with knowledge of the law. Let them compete with one another and with business men on an equal footing. As it is today, the lawyers are frequently the losers by following the old régime. The client does not hesitate to drive a sharp bargain with the lawyer, while the lawyer always gives the best of it to the client.

In the opinion of the committee, the academic lawyer has done as much, if not more, to discredit the profession as the dishonest practitioner. Trying a case as an abstract intellectual proposition usually results in failure. Advising on a business question from the purely academic point of view generally spells disaster, if the advice is followed by the client. To the academic lawyer, with the tendency which many of them have to introduce imaginary complications into simple matters, is ascribed responsibility for the fact that so many people have the idea that "the law is a man trap, the lawyers being the trapper and the clients the trapped." The report goes on to emphasize the business aspect of legal pursuits as follows:

> We are sometimes incensed at laymen who talk about "the Law Business." They are more discerning than we. There is a law business—that is, our business. There is the law profession and practice—that is, the business we do for clients. We have no occasion to be offended when a friend asks "How is the law business?" Not one lawyer in a hundred has a correct conception of his own practice as a business proposition. He regards it generally as a profession in which he renders services for others for which he gets paid. This is true as far as it goes, but what he does not see is that in *fact he is conducting two businesses at the same time—his own business and that of his clients.* The average lawyer devotes practically all of his time and attention to his clients' business and lets his own take care of itself. Yet from the lawyer's point of view, his own business is far and away more important than that of his clients. He does not realize that to make a real success of his profession he must all the time carry on two separate and distinct businesses—his own and his clients'. Of the two, the clients', generally speaking, is far simpler than his own and is something in which he is better trained. The clients' business consists of a given piece of professional work, such as trying a case, drawing a will or probating an estate. These require books and stenographers and clerks perhaps, but the business part of such work is negligible.

Better business management of the office will give the lawyer that freedom from detail which will enable him to concentrate on matters of real importance. The modern executive head of a large concern, according to the report, has a system which requires others to attend to the routine business. He is thus left free to look and plan ahead, to study his business in its largest aspect and to shape its general policies. Lawyers may well follow this example. Much of the detail that now requires their personal attention can be delegated

to others. The report continues with a realistic picture of "Two Kinds of Lawyers," one of the old school and one of the new, the office of the former being distinguished by its lack of order, and that of the latter by its business-like methods. An interesting little disquisition on salesmanship follows, in which it is pointed out that, in a sense, the lawyer sells himself to his client and that none of the important features which makes sales attractive and easy in ordinary business need be overlooked in his pursuit.

It is impossible to outline a system, according to the report, that will fit both the large and small offices. The range is too great between the one-lawyer office, with one employee, occupying one comparatively small room where the gross income is, say, $2,000 per year, and a large office in a large city, where they have 50 employees, operating expenses between $175,000 and $200,000 per year, a stenographer for each member of the firm and many more besides, a library of thousands of volumes occupying a great room which costs $6 per square foot per year, two telephone switchboards and twenty telephone trunk lines, eight office boys, six clerks with the managing clerk and his assistant, two filing clerks trained for library work, and a gross income of $500,000 per year. However, the principle of organization is the same, only its application is varied to meet the different situations. Many appliances and methods are common to both, though the degree of elaboration differs. The report states that, on the whole, it seems better to outline a system that is suited to large firms, leaving the small firm to eliminate features that do not fit their individual requirements.

Following is a somewhat abbreviated statement of the "elements involved in a comprehensive system for large organizations," with brief comment, as set forth in the report:

Location.—In deciding upon the location of his office the lawyer should take into account the situation of the building in reference to the Court House, the banks and financial district and his principal clients; the size of his business and its probable growth along certain lines; the appearance of the building and the service furnshed to tenants, and its reputation.

Economical arrangement of floor space.—The reception room should suggest industry and business methods, not hurry and noise; neatness, not elegance. Private offices should be according to the space available and the business of the firm or individual. There should be a consultation room in which to see clients upon matters taking but a few minutes, when other clients are in the private office on long conferences. There should be room for stenographers, clerks, office boys, filing clerks and bookkeepers. Stenographers should be in a light, airy room, so located that the noise will not disturb others, and noiseless typewriters should be used under certain circumstances. There should be a vault where papers and books of account are kept at night, library space as large and as light as the pocketbook will permit, lavatories and coat rooms and a switch board.

Furniture and filing system.—Filing cabinets and filing system—indexing; chairs, desks, pictures, switchboard, etc.; cases for legal blanks and stationery—index of same. Use only flat top desks. Keep them clean and free from papers. They are not intended as storage places. Have every paper in the vault at night. The busiest lawyers have the cleanest desks.

Library.—Books, advance sheets, session laws, citations, catalogues and indexes. These should be kept up, bindings should be repaired and lost volumes replaced. In the larger places the community library has proved successful, but in the smaller places it has not been found practicable.

Vaults.—Filing cabinets, safe, strong boxes for valuable documents and cash box.

Books and bookkeeping.—System of keeping a record of all services rendered to clients and charging therefor; system of keeping accounts of all moneys received and paid out; system of charging and billing clients for services and expenses; monthly trial balance; monthly statements to clients; debit and credit slips; computation of overhead expense; charging for telegrams and telephone calls.

Dockets and watching cases.—Dockets showing complete record of cases; diary and tickler showing dates of trials, etc., docket slips and reports to docket clerk.

Office help.—Trial lawyers and clerks—their duties; stenographers and typists; office boys (they must be neat in appearance and of good character. A firm is judged by its office boys); bookkeepers; switchboard operator; filing clerks, private secretaries for members of the firm.

Miscellaneous.—Division of work between employers and employes—specializing; proper handling and distribution of mail in the office so as to insure prompt attention; sufficient number of trunk lines to afford ample service for incoming and outgoing telephone calls; system for keeping track of whereabouts of partners and employees; system of calls for clerks, office boys and employees.

Periodical statements showing items of expense and percentage of expense to receipts, and also periodical statements showing where business comes from, what clients have been lost and why, what parts of the business are the most and the least profitable; system of keeping clients advised of progress of their cases; lists of correspondent attorneys and maintenance of relations with them.

Proper attention to correspondence—to the character of stationery, type, style, signatures; promptness in answering and mailing replies. Use high grade bond paper and dignified clear-cut type for firm or individual name, small rather than large letters. Use no advertising matter such as the different branches of the law followed by the firm. Use different sized letter heads for long and short letters. Careful nandwriting and signatures are essential. Composition, English and punctuation indicate the character of the individual and the firm. Too much care cannot be taken along this line. Brevity and conciseness should be cultivated. Map out before dictating the more important letters and read them after dictation. Answer every letter the day it is received unless there is some good reason why the answer should be postponed.

Dictaphones, typewriters, adding machines, bookkeeping machines, stamping machines—in fact, every device that will save time and personal attention on the part of the busy lawyer should be installed.

Binding and indexing printed and trial briefs; standardizing forms of letters, wills, contracts, deeds, etc.; card register for claims, showing parties, forwarder, etc.; periodical conferences of partners to determine fees and check up business; life insurance on partners in favor of the firm; partnership agreement, fixing amount to be paid to the estate of deceased partner, etc.

Planning future work and dispatching today's work; manual of instructions regarding office system which every one in the office should be required to read; filing in proper container, the system of indicating at the top of the document on the front or back, the proper file being recommended; schedule of day's work.

Short opinions and clear to the layman, with no unnecessary citation of authorities or legal phraseology; up-to-date list of clients and telephone numbers; record of all callers at the office; advance sheets which should be read by all the lawyers in the office.

The Committee says in answer to the query, "Which should come first: The Business or the System?" that "the same question confronts the average manufacturer. Should he build a factory, manufacture goods and then create a demand for them, or should he undertake to create the demand first? The answer is simple. He must, of course, build and manufacture first. Perhaps on a small scale, but the demand follows the manufacture and marketing of the product. The answer is the same in the case of the lawyer. He should install a system first; otherwise the public may be suspicious that he cannot make deliveries." It then proceeds to discuss certain features of the system outlined, taking up files and filing system first:

Of these four systems, the numerical seems to be best suited to the needs of the lawyer. Each container can

be given a number and the file-case drawers will show what numbers they hold, or all the containers held in one drawer can be given the same number and then the containers can be arranged alphabetically within the drawers. A card index showing cross references, plaintiffs and defendants, will be employed in connection with this system, however modified. Furthermore, all matters coming into the office will be first divided into some such classes as these: (a) Suits; (b) Collections; (c) Office business; (d) Miscellaneous; (e) Correspondence.

For each of these there may be a separate index, and the container and the card will both show to what class the file belongs. Other classification and, if necessary, sub-classifications can, of course, be made. . . .

The following is submitted as a basis—as a type—of a filing system, to be expanded, contracted, or otherwise changed to meet the particular requirements of the individual lawyer or firm. This system is installed in several offices and is giving satisfaction to those who are using it.

All new matters which come to the office are divided into one of two classes, viz.: "Special," or "General," which is sometimes called "Miscellaneous." Each special matter is given the next file number in a series which has been maintained by the office since the installation of the system. A card is then prepared for the alphabetical card index system, which should contain in addition to the file number, the names of the principal parties concerned, the title of the case or the matter under consideration, and if the size of the office justifies it, the name of the lawyer in charge. An expanding folder or envelope is provided for all papers and other loose data of the case. This is entitled with matter involved and bears the serial or file number and takes its place in the files according to its number. If it is a case, it is well to note on the file the docket and page in which the case is docketed.

The report follows with recommendations as to filing Abstracts and Opinions, Plat books, Disposed-of Files, General and Miscellaneous Matters, and states that "attempts have been made to maintain subject indexes, but they seem to have been unsuccessful owing to cost of maintenance and questionable value."

In the sub-division on "Docketing and Watching Cases," the report says many lawyers are now using card dockets inasmuch as "they are flexible, easily removed and cases are readily located in them. Card records for collections are almost universally used." It is also stated that "some offices give each court a distinguishing number or letter, which is used in connection with the office serial number, so that the name of the court in which the case is pending may be known at a glance at the serial number, wherever it may be used. Other court numbers or letters may be added to the serial number as the case is transferred from one court to another."

The Committee discusses the Office Diary, Court Slips, Duty of Diary Clerk, Daily Court Bulletins, etc. In regard to the "Office Diary", it says that "the card diary seems to be generally used in the larger offices. It has this advantage over the book: Memoranda of things the doing of which has been postponed can be slipped in to the appropriate date without re-writing. And today's matters unless disposed of will be found in tomorrow's diary."

"Bookkeeping and Charging Systems" are next discussed. The necessity of keeping a definite record as a means of eliminating waste, of saving the lawyer trouble, of securing a proper basis for charges, of determining profit and loss in the various branches of the business and of keeping a check on expense items, is pointed out. However, there is nothing peculiar in a law office that requires a bookkeeping system different from that used in commercial houses generally.

The report adds:

> To suggest or formulate a system of bookkeeping that would be adapted and suitable for every office is impossible, but there are certain essentials necessary in any system. The double entry system is advisable for most offices, whether in the city or in the country. The necessary books are a journal, ledger, cash book and petty cash book. A correct and accurate account of all cash received and paid out is the foundation of a lawyers accounting. Failure to charge a client for service performed is not so serious, but when a client pays his bill or a retainer and no record is kept of such payment, he is justified in concluding that lax methods are employed.
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> Some lawyers think that a cash book having printed headings, with four or more columns on a page, is a great convenience and saves much labor in posting. On the left-hand page should be entered all the cash received, from whom received, and on what account. One column might be for sundries, another for fees, another for collections and perhaps another for the bank. On the right-hand page should be entered all payments and disbursements and for what accounts made. The headings of the columns might be "Sundries," "Expense," "Personal," "Bank" or other appropriate designations. All receipts and expenditures should, of course, be entered in the appropriate column. The cash book should be balanced daily or weekly, depending on the transactions of the office, and the balance carried forward to begin the next day's business. All the items in the cash book should be posted in the appropriate accounts in the ledger.
>
> In the journal should appear all transactions not involving cash, such as charges for services rendered to clients, rebates on fees, corrections of errors caused by mistakes in posting and closing entries for the year. Some lawyers find it advisable to combine the cash book and journal. This is practicable and eliminates one volume.
>
> In the petty cash book should be entered all cash expenditures as distinguished from expenditures made by check. A petty cash fund should always be maintained. This is essential to the expeditious handling of the ordinary daily business of either a large or small office.
>
> It is convenient to have debit and credit slips about four by five inches put up in blocks, white for debits and pink or blue for credits. These are filled out and initialed by the person receiving or paying out the money and are filed with the bookkeeper.
>
> In the ledger should be accounts for library, bank, fees, salaries, stationery, supplies and printing, rent, light, postage, petty cash and other incidental items as well as personal accounts with clients and creditors. Expenditures for clients should be charged to them by name and posted to their ledger accounts. Trust funds should always be kept separate from firm funds and should have their appropriate ledger headings. A trial balance of the ledger should be taken once a month and from it statements made and sent to clients. A statement of the business at the end of each month is useful, and at the end of the business year a complete and comprehensive statement should be made. This should show a summary of the business after the closing of the ledger and the transferring of the profits to the partners, if a partnership, or to the individual, if he practices alone.

Speaking of "charging systems", the report says that, for the purpose of keeping an accurate record of the time spent and the work done for each client the members of a law firm should each make out a record the same day on which such work is done and it should be sufficiently explicit as to be available in case there is any controversy on the subject. Some lawyers dictate a memorandum at the end of each day and others prefer to enter the information in a bound book kept for that purpose. "In either event it is important that the record be made each day and kept in some permanent form available not only at the end of the month but at any future date. . . ." As the essentials of a practicable charging system the following alternative plans are suggested: (1) A time book, or daily record book, about four by ten inches, in which the lawyer enters the necessary details each day; and a time ledger, loose-leafed, about eight by fourteen inches, in which are to be copied each day in chronological order the items in the time books of the members of the firm. (2) Charge slips, or cards, containing the same information as the time books,

which can be arranged to show the day divided into fifteen-minute periods, and also made to divide laterally at any point so that the various portions can be filed in appropriate envelopes; and an envelope file in which the card slips are filed each day in envelopes marked with the client's name or the case; or a time-ledger in which the information can be copied each day from the cards.

The division of work, the report states, necessarily depends on the practice and the number in the firm. Cases should of course be distributed to the members on the basis of specialization, as far as practicable. In any event, some definite system should be followed, "always with the aim of minimizing effort and increasing efficiency in handling the business of the office." The details of litigation should, as far as possible, be turned over to clerks; also all petty justice of the peace cases. But a close check should be kept on them and the same standard of efficiency given the client in small as in large matters. This is followed by brief discussions on "the training and development of office workers," on the need for departmentalizing larger offices, and the advisability of close and courteous attention to all telephone calls. On the character of the office interior it says:

> The selection of office furniture and equipment is a matter depending entirely upon the requirements of the firm or individual. It pays to have good furniture, that is, furniture that is well selected and substantial. Pictures should be limited in number and of a character suitable to the profession. Usually the political affiliation of the individual or of the members of the firm should not be disclosed by pictures. A well arranged office, neatly kept, and furnished in a substantial manner, should impress the client favorably. A lawyer's work-shop should give the impression of order, system, dignity and neatness.

The carbon method of keeping a record of letters is recommended as superior to the letter press copy book; the carbon may be made on sheets, fitting into a loose-leaf binder and these books kept in chronological order. The binding in permanent form and the indexing of briefs, after a case is disposed of, are recommended. Every office is advised to have a "Common-Place Book," either in the form of a properly indexed book or a card system, to contain a record from time to time of interesting decisions and decisions on new questions. Under the head of "Legal Blanks", it is stated that perhaps the best method of filing is "in alphabetical order in a filing case with guide cards."

The Committee in conclusion recommends that in connection with a permanent committee on this subject "members of the bar generally be invited to make suggestions to this committee both as to complete systems and parts of systems in law offices and that this committee act as a clearing-house for the exchange of views on this subject"; also "that efforts be made to interest law schools, Bar Associations, writers and others in spreading the gospel of up-to-date methods for up-to-date lawyers."

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CURRENT LEGAL LITERATURE

IN the issue of June 17 of the Central Law Journal, S. D. Rouse of Covington, Ky., discusses the merits of the rule prevailing in Kentucky and in some other jurisdictions to the effect that in the trial of a cause where the party having the affirmative of the issue produces competent and relevant *evidence, slight and unconvincing* though it may be, the question must be submitted to the jury, even though the court upon application would set aside a verdict based upon such evidence.

Mr. Justice Riddell of the Supreme Court of Ontario, after reviewing the status of *declaratory judgments* in Canada, concludes that their operation has been found beneficial and that there is no movement to abandon them. (Law Notes, June.) In the May issue of the Harvard Law Review, Edwin M. Borchard contributes a valuable examination of the Uniform Act on Declaratory Judgments approved by the National Conference of Commissioners on Uniform State Laws at its session in St. Louis in August, 1920.

Chief Justice Harry Olson of the Municipal Court of Chicago discussed at length the work of the Psychopathic Laboratory of that court in an address before the Cleveland Bar Association at its meeting in April. Matter there set out and some of the material from Judge Olson's report of the work of the Court are printed in the Ohio Law Bulletin and Reporter of June 20. His conclusions are reprinted:

> The following are some of the deductions which appear justified by more than six years of systematic and consistent intensive study, covering nearly 20,000 cases:
>
> 1. The entire crime problem is largely a problem of adolescence. Few serious crimes are committed by persons who have not revealed wayward conduct before attaining their majority.
>
> 2. The boys between the ages of sixteen and twenty-one who commit the more serious offenses are found to have records of conflicts or criminal conduct extending back to an early age. This emphasizes the need for identifying these individuals at the beginning of their careers if there is to be successful prevention of crime.
>
> 3. Until recently crime prevention has implied two things: first, enough patrolmen to make the commission of crime difficult; second, sentences to effect reformation and to deter potential delinquents. The first theory has some validity, but does not reach very far. The second has been seen to have a measure of falsity ever since correctional methods were applied. Knowledge of mental defectives explains readily why certain individuals are not deterred by the punishment of others, or even by their own punishment.
>
> 4. Crime prevention is now seen to imply control of that relatively small element, which, because of mental abnormality, fails to react properly to correctional or punitive treatment.
>
> 5. The first step, obviously, is to identify and tag these individuals. The first preventive work will probably in time be that done among backward and incorrigible pupils in schools, both public and parochial.
>
> 6. The ordinary routine of confinements for short periods is wholly ineffectual in the cases of defectives. Reformatories can not really correct the essentially dangerous individuals, those having defective emotionality coupled with inferior intelligence. On the contrary, these individuals corrupt the purely feeble-minded inmates, making endless trouble for the managers. Such cases also tend to bring probation methods into disrepute.
>
> 7. In practically every case a serious offense is committed only by a person who has a record of lesser offenses. *Serious crimes are committed between prison terms.* Periodic liberation of the dangerous type is certain to result in failure.
>
> 8. With present experience continued instances of delinquency impute mental defectiveness, the nature of the offense usually defining the type of defect.
>
> 9. Real prevention implies the establishment of an institution, or possibly several for different grades, in which dangerous defectives can be segregated to receive appropriate treatment, largely of an occupational nature.
>
> 10. It is highly important that the intimate relation between delinquency and defectiveness be understood by all persons concerned with handling of delinquents, to the end that suspected cases be examined before being placed on parole from prisons. Many murders could be prevented by sending incorrigible boys from Reform Schools to a farm colony, instead of releasing them to continue their hopeless careers.
>
> 11. The prevention of brutal crimes, which is the crux of the crime problem, must come through recognition of the problem as one of mental defect. Moral defects are embraced in this general term. Reform of rules of criminal procedure is a minor consideration. The problem is mainly that of psychopathic study and subsequent administration.
>
> 12. There is really nothing new in the situation except the means, through psychological and psychiatric means, to detect and classify mental defectiveness. It has been accepted for generations that some delinquents would be reformed through punishment, or correctional treatment, and that others would only be rendered more helpless. Until recently there has been no way to sort out the delinquents and apply appropriate kinds of treatment to the two classes.
>
> The only way was to treat them all as reformable until such time as every means failed and a crime sufficiently crass was committed to justify a long sentence. This was a classification based on the trial and error method. The errors constituted the heart of the crime problem.

The literature for the year on *stock with no par value* seems to be completed by the extended article in the June issue of the Minnesota Law Review. The authors are Raymond F. Rice and Albert J. Harno.

A collection of the authorities upon *repugnant clauses in deeds* is found in the Virginia Law Register for June, it being the work of the Associate Editor, Beirne Stedman.

The May issue of the American Law School Review is largely devoted to making widely available the addresses and discussions of the last meeting of the *Association of American Law Schools* and of the section of Legal Education of the American Bar Association.

In the May issue of the Harvard Law Review Professor Samuel Williston reviews the important cases in the *law of sales* during 1919-1920.

Francis Newton Thorpe of Pittsburgh addressed the Allegheny Bar Association in January of this year, his subject being Hamilton's ideas in *the decisions of Chief Justice Marshall.* This address is printed in the April issue of the Boston University Law Review. It is an important addition to the literature on the work of Marshall in shaping American institutions.

Probably the year's most important contribution on the subject of industrial relations in their legal aspects is an article by James H. Tufts on Judicial Law-Making Exemplified in *Industrial Arbitration* printed in the Columbia Law Review for May. This article is based upon Professor Tufts' experience as Chairman of the Board of Arbitration under the Hart, Schaffner and Marx Agreement. The thoughtful opinion of many is that the developments along lines here described hold more promise of an orderly handling of labor disputes than do experiments like the Kansas Industrial Court Act.

In the fields of administrative and constitutional law, few cases have awakened more interest in recent years than Ohio Valley Water Co. v. Ben Avon, 253 U. S. 287, a holding on the necessity for judicial review of *administrative findings in rate fixing.* The case is the subject of an article by Nathan Isaacs in the

Yale Law Journal for June and of one by Thomas P. Hardman in the May issue of the same journal.

Few more stimulating discussions of the question of valuation in rate making have appeared in recent years than *"The Physical Fallacy in Rate Cases"* by Robert L. Hale in the journal last mentioned.

Walter Wheeler Cook points out in a lucid manner that the difference between "facts" and "conclusions of law" in the procedural rule prohibiting the pleading of the latter is usually merely a difference in degree of permissible generality of allegation and must necessarily be so. *"Statements of Fact In Pleading Under the Codes."* Columbia Law Review (May).

Those finding themselves interested in questions of *interpleader* will welcome an article by Zachariah Chafee, Jr., in the June issue of the Yale Law Journal entitled "Modernizing Interpleader."

An important study in the *history of the English law courts* is "The Origin of English Courts of Common Law" by George Burton Adams of Yale University. Yale Law Journal (June).

A considerable area of the unworked field as to *provability of claims against insolvent corporations in receivership* is well covered by Mr. Justice John K. Beach of the Connecticut Supreme Court of Errors in an article published in the May issue of the Yale Law Journal.

"Mental Deficiency and the English Law of Contracts" is the title of an article by W. G. H. Cook, Middle Temple, London, printed in the May number of the Columbia Law Review.

A reasoned and fair statement of what can be said in favor of the manner in which *speech* was regulated during the *Great War* is an address by James Parker Hall printed in the June issue of the Columbia Law Review. So little has appeared in current law journals upon this side of the question as to make Dean Hall's statement most timely.

"Some Legal Problems Involved in *the Transmission of Funds"* by Harlan F. Stone in the Columbia Law Review (June) is an important contribution to the law of banking.

The only article of the month on the *law of negotiable instruments* is one by Zachariah Chafee, Jr., in the journal just mentioned dealing with the difficult problems which arise when a prior holder acquires an instrument.

The *limitations* placed by the judiciary *upon the treaty making power* are discussed by J. Whitla Stinson of New York City in the April number of the Boston University Law Review.

THE LEGAL AND SOCIAL PHILOSOPHY OF MR. JUSTICE HOLMES

Comment on His Views of the Logic of the Law, the Function of Courts in a Democracy, the End of Law and Ultimate Standards

By JAMES H. TUFTS

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THE *Collected Legal Papers* of Mr. Justice Holmes, appearing almost simultaneously with the *Letters* of his classmate and lifelong intimate friend, William James, suggests beneath the many respects in which their tempers, researches, and occupations have differed, one fundamental attitude in which the two men agreed: growing to maturity at a period when evolutionary philosophy was at once giving new interest to the genesis of mind and institutions and at the same time shaking the authority of the past as past, both thinkers made deep-going analyses of assumptions and logic in their respective fields. By giving a new name to some old ways of thinking, and making an assault on the centre with the martial accompaniments of trumpet if not of drum, James flung his challenge more dramatically into the ranks of absolutism. The Justice has rather selected an advanced position and maintained it firmly, sometimes finding support in the majority of the Court, often—perhaps more often, when dealing with the newer issues of a changing social order—finding himself in a minority; but he has stood no less definitely than James as an exposer of the fallacies of absolutism. James attacked two absolutist systems: first, the absolutism of a type of natural science, which converts a useful point of view for looking at things from the outside into a mechanistic metaphysics; and second, the religious absolutism which at first expressed itself in theology, then in the metaphysics of a certain type of idealism. He sought room for the aspirations, choices and moral struggles of the individual spirit. If this were a block universe, whether a mechanistic block or a monistic metaphysical block, there was no chance for life to achieve individuality and worth. Holmes has as firmly set himself against a block universe of legal conceptions and rigidly fixed social order. He has sought to give man room to express his advancing needs in an orderly progressing society.

Many phases of the philosophy embodied or suggested in the essays are of interest to the student of thought, but perhaps those most appropriate for comment here by a layman are the views of the logic of the law, of the function of courts in a democracy, of the end of law, and of ultimate standards.

I.

The illusion of certainty in legal doctrine is a stubborn obstacle to a reasonable adaptation of law to social conditions. For a long time law shared this illusion with other bodies of doctrine: with formal logic, with mathematics, with natural science, and with theology. "The language of judicial decision," says Justice Holmes, "is mainly the language of logic, and the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is an illusion." Why is "certainty generally an illusion?" There are at least three critical points in a logical process which termi-

nates in a decision upon a concrete problem: (1) the original conception or premise, (2) the process of going from this original premise to other propositions by means of so-called middle terms or connecting links, (3) the application of some one of these derived concepts to the particular case in hand. Formal logic does not raise questions as to its original premises, and in "pure" sciences we may avoid challenging our premise by taking it as purely hypothetical, as a definition. One set of definitions gives us Euclid, another gives us a different geometry. Law, however, is not at liberty to adopt either of these methods of avoiding the issue. Its premises may be sought in statutes, in natural law, or in custom or public opinion as judicially recognized and defined by previous decisions. The uncertainty in the interpretation of the meaning of constitutions and statutes is patent. Even the layman knows something of the history of the Fourteenth Amendment and the Sherman Act. As regards natural law, "the jurists who believe in natural law seem to me to be in that naïve state of mind that accepts what has been familiar and accepted by them and their neighbors as something that must be accepted by all men everywhere." (p. 312.) The established interpretation may seem a more secure and certain source for major premise, but of course another ground of uncertainty exists here, since a decision is a decision of a particular case and before it can be generalized into a major premise there must be greater discrimination as to just how universal is the principle which is implied and just how comprehensive are the terms which are involved.

The second step in the process, the discovery of middle terms or the movement from our first principle to some derived rule or conception is more plausibly a process of pure logic. But it is one thing to say that we must be consistent, that we must not commit certain obvious failures, and quite another thing to say that the conclusion reached is the only one possible. If we start with such a general concept as freedom and attempt to deduce its consequences, it is perfectly possible to follow one line of intermediate concepts that will land us in a firm foundation for trade unionism, and if we use another set of intermediate terms to reach a firm foundation for the open shop. As a matter of fact the mind moves forward in such a chain of reasoning, not by a series of identities which would only yield to us such empty propositions as "freedom is freedom," but rather by selecting that particular step, out of two or more possible steps, which for any one of a variety of reasons is most congenial to its present temper. The mind zealous for individual liberty will select one set of middle terms, the mind equally zealous for association will select another series of middle terms. In law the processes of reasoning by which original conceptions have been expanded into a body of doctrine have owed much to tradition, much to notions of policy. The essay on "Agency," which is the longest in the present volume, is an elaborate analysis of the growth of a particular doctrine under the influence, on the one hand, of the fiction that within the scope of the agency principal and agent are one, and, on the other, common sense setting limits to certain consistent consequences of the fiction. The essay gives "my reasons for thinking that the whole outline of the law is the resultant of a conflict at every point between logic and good sense—the one striving to work fiction out to consistent results, the other restraining and at last overcoming that effort when the results become too manifestly unjust." (p. 50.)

Finally the application of any rule or concept to a concrete case is in its very nature an uncertain thing. For as has long been familiar to students this is precisely a matter of judgment, not of necessity. Professor William James has shown more clearly than anyone before him one ground of this uncertainty, namely, that all concepts are teleological; that is, they depend upon a specific purpose or interest, and consequently every concrete object may be brought under any one of several concepts. This object before me may be regarded as a table or as a seat or as a weapon, or as a life-preserver—according to the use that I wish to make of it. A corporation may be a person or it may equally well, so far as logic is concerned, be regarded as impersonal. A trade union may be regarded as a conspiracy to raise prices or as a guild. One is just as logical as the other. Whether we decide to put it under concept A. or concept B. depends upon our views of public policy, our customary association of ideas, and various other psychological laws. These considerations are perfectly well known to students of psychology and logic. Doubtless the more thoughtful members of the legal profession are perfectly aware of them. It is in fact hard to see how anyone can fail to draw the obvious conclusion who reads dissenting opinions or even finds his own chain of logic, well fortified at every step by precedents, set aside in favor of another chain of logic no better supported. Yet there is undoubtedly an obsession in the minds of many laymen and perhaps it would not be presumptuous to say, in the mind of some men in the legal profession, that law is certain. "Judicial dissent is often blamed, as if it meant simply that one side or the other were not doing their sums right, and, if they would take more trouble, agreement inevitably would come." (p. 180.)

It is of course in constitutional law that the factors of the personal element and of social theory are most conspicuous. Since the appointment of John Marshall every political party has deemed it as important to get its men on the bench of the Supreme Court as to place them in the other branches of the Government, subject to the limitation that a court in which all the judges were from one political party would be likely to be too obviously of one sort and thereby would lose something in general confidence. It is scarcely conceivable, however, that either party would make an appointment which would give the majority to the other. Even more important than the political party is undoubtedly the general attitude of the candidate as between what are called conservative and liberal views of social theory. On the great constitutional question which in one form or another has so frequently divided the court since the Fourteenth Amendment was adopted, namely that of individual rights versus public control, the issue is to a very slight degree legal. It is rather one of well-considered public policy. The great service which Justice Holmes has performed in his service upon the bench and in the various papers in these volumes is to destroy the "magic" which in the minds of many invests legal decisions, and to enable us to see how the various factors of tradition and views of public policy inevitably enter in. "Certitude is not the test of certainty. We have been cock-sure of many things that were not so." (p. 311.) "Behind the legal form lies a judgment as to the relative worth and importance of

competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding. You can give any conclusion a logical form." (p. 181.) On the positive value that would result from a more frank recognition of this general situation I will speak under a later head.

II.

The function of courts in a democracy is not as violently under discussion at the present moment as it was nine or ten years ago, partly perhaps owing to the view which Justice Holmes so vigorously defended in his dissenting opinion on Lochner v. New York. The fundamental question is as to how far courts shall throw their weight against popular will as expressed through legislation. The issue is of course not argued under just that form. It is ordinarily thought to be an issue as to whether a certain statute is constitutional, but for all the reasons named under (1) above this is not a matter of logic. When it comes to interpreting the principles of the constitution it is largely a matter of the social philosophy of the judges. To quote examples of this would be almost equivalent to a history of Supreme Court decisions since the day of John Marshall. The case of Ives v. South Buffalo Railroad was an especially notable instance in which the phrase "due process of law" was interpreted to mean the economic and social theory supposed to have been held by the framers of the New York Constitution. The recent cases as to the New York Housing Laws are sufficiently in mind. A number of recent decisions as to the rights of trade unions are similarly the expression of a social philosophy although the issue of constitutionality is not here involved. Few thoughtful persons especially in view of recent cases of legislative as well as political hysteria will question the value of constitutional guarantees for the rights of minorities and in general for a long run versus a short run policy. But there has undoubtedly been much more than this in certain decisions. "When socialism first began to be talked about, the comfortable classes of the community were a good deal frightened. I suspect that this fear has influenced judicial action both here and in England, yet it is certain that it is not a conscious factor in the decisions [on liability in injury cases] to which I refer. I think that something similar has led people who no longer hope to control the legislatures to look to the courts as expounders of the Constitutions, and that in some courts new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of the economic doctrines which prevailed about fifty years ago, and a wholesale prohibition of what a tribunal of lawyers does not think about right." (p. 184.)

The events of the war have brought about an interesting shift in the attitudes of conservative and liberal groups toward majority rule expressed through legislation on the one hand and constitutional guarantees as supported by the courts on the other. This shift ought to give a somewhat broader perspective for considering the general function of courts in a democracy. In the years preceding the war liberal groups generally stood for majority rule; conservative groups for the constitutional guarantees which were at that time chiefly invoked by property interests. During the war and since the war majority legislation has frequently been directed against personal rights of free speech or of free print, which were supposed to be protected by constitutional guarantees; the conservative in this case espouses majority rule.

In the interval between the Civil War and the Great War, the great legislative movements of interest to political and social philosophy were of three general groups. (1) The efforts to resist the menace of big business through such legislation as the Sherman Act or the Granger legislation; (2) legislation designed to help the underdog whether the negro, the laborer, or the child; (3) to secure a juster distribution of burdens, such as the Sixteenth Amendment. The reasons were obvious: The great business organization had come to have power of taxation and thereby of control—whether exercised wisely or unwisely is not the point—far greater than the taxing powers of the Government. It could legislate practically without appeal upon the daily household expenses of every family in the country. It could build up or tear down communities. It could decree employment or unemployment. It could and in several cases did control legislatures and courts. The conditions of the negro, of the industrial worker, and of the child laborer were not to be explained as due to the faults of the individual, and they raised an issue in which property was again the defendant. The unequal distribution of burdens when federal taxes were laid largely upon consumption and when the general operation of the economic system was to place sixty per cent of the wealth of the country in the hands of two per cent of the population was apparent. The Sixteenth Amendment involved perhaps the most fundamental change in our policy since the Constitution was formed. The various legislative efforts along the three lines suggested were not absolutely blocked by the courts and yet in many cases they were strongly resisted.

In such a situation the best interests of the republic might conceivably be met in two different ways. The courts might be frankly recognized as properly taking sides according to the convictions of the judges upon social philosophy. This would at least have the merit of making the issue clear with regard to the election or appointment of judges. It would then be definitely understood that Justice A. would in all cases support the interest of one party to labor controversies (a Brooklyn judge has recently been reported as saying that the courts should support the side of capital) and would therefore strain every nerve to resist all legislation controlling wealth or aiding the laborer or vice-versa. Or (2) the courts might hold, as Justice Holmes maintained in his dissenting opinion in Lochner v. New York, that it was not their function to prevent a majority from enacting its opinions into law and that in refusing to interfere with legislation they were not thereby registering their own approval or disapproval of the opinions involved. It can hardly be denied that the first attitude would place the courts in a very trying situation. It is also true that if the courts place no restrictions upon majority action the underdog is bound at times to suffer, for although numerically he may be in the majority there are many slips between a numerical majority and the enactment of legislation. The position of Justice Holmes as indicated in the *Collected Legal Papers* is not that of either (1) or (2) in its extreme form. In certain passages it seems to go farther toward the first attitude than did his dissenting opinion in the Lochner case. There the position was that the majority has a right to embody its opinion in law "unless it can be said that a rational and fair man necessarily would admit that the

statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." On the other hand in the address on the "Path of the Law" the author seems to hold it the duty of courts to be thoroughly informed as to social problems and to take considerations of social advantage consciously into account when performing their judicial duty. "I think that the judges themselves have failed adequately to recognize their duty of weighing considerations of social advantage. The duty is inevitable, and the result of the often proclaimed judicial aversion to deal with such considerations is simply to leave the very ground and foundation of judgments inarticulate, and often unconscious, as I have said." (p. 184.) Again, "inasmuch as the real justification of a rule of law, if there be one, is that it helps to bring about a social end which we desire, it is no less necessary that those who make and develop the law should have those ends articulately in their minds." (p. 238.)

This general attitude of having the social ends articulately in mind is subject to two qualifications. There are cases which are not doubtful, "because one or the other desire may have been expressed in previous decisions to such an extent that logic requires us to assume it to preponderate in the one before us." (p. 239.) It is in doubtful cases that "what really is before us is a conflict between two social desires, each of which seeks to extend dominion over the case." "Where there is doubt the simple tool of logic does not suffice, and even if it is disguised and unconscious, the judges are called on to exercise the sovereign prerogative of choice." (p. 239.)

In another passage a somewhat different attitude in cases of doubt is set forth. "While there still is doubt, while opposite convictions still keep a battle front against each other, the time for law has not come; the notion destined to prevail is not yet entitled to the field. It is a misfortune if a judge reads his conscious or unconscious sympathy with one side or the other prematurely into the law, and forgets that what seem to him to be first principles are believed by half his fellow men to be wrong." (p. 295.)

To be on the one hand above the battle, and on the other hand to have a conscious social philosophy is not an easy position. It simplifies life very much if, like the judge to whom Justice Holmes refers, one can be absolutely sure that he is right, and can add to this the unhesitating view that all other opinions should be suppressed. A different philosophy would find relief in uncertain cases by the consolation that it does not make much difference either way. Justice Holmes is not convinced that ours is the only possible code of laws. "I believe that the world would be just as well off if it lived under laws that differed from ours in many ways." (p. 239.) "I do not think the United States would come to an end if we lost our power to declare an act of Congress void." (p. 295-6.) There is, however, one fixed limit. "I do think the Union would be imperiled if we could not make that declaration as to the laws of the several states."

The general position of courts in the estimation of the country has undoubtedly undergone serious modification in the course of our history. At the outset when the constitution was as yet a child, rather than an august parent and when Jefferson and the Federalists did not hesitate to regard constitutional questions as primarily matters of policy and the court as representing a policy, there seems to have been no greater sanctity about courts than about other governmental bodies. Then came a period of increasing veneration, broken by indignant protests at the Dred Scott decision, but lasting on the whole until the clashing policies of recent years, which have been backed by strong groups. It looks now as though we were likely to have a period of sharp and perhaps increasing class consciousness. The courts will be fortunate if they can retain general confidence. They certainly cannot do this by ignoring the thinking of the time, nor yet by violent partisanship. They will be fortunate if they can take so large a view of the situation as to be reasonable. Which means, does it not, to take account of all persons and all factors concerned and endeavor to give each his or its due recognition. An impossible task, of course, and yet it is much to have a vision of this breadth.

III.

Further doubts as to legal absolutism are raised by various discussions as to the nature and end of law. It does seem at first sight a somewhat cynical doctrine that law may be regarded as nothing more or less than prediction and that to get a clear view of law as law it must be emptied of moral implications. "If you want to know the law and nothing else you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience." Legal right and legal duties are similarly to be translated into terms of what will happen. And the speculation is offered as to "whether it would not be a gain if every word of moral significance could be banished from the law altogether, and other words adopted which should convey legal ideas uncolored by anything outside the law." Support for this separateness is found in the fact that "many laws have been enforced in the past and it is likely that some are enforced now, which are condemned by the most enlightened opinion of the time, or which at all events pass the limits of interference as many consciences would draw it." A student of public opinion might re-enforce the argument still further; not only may it be held that "the duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it—and nothing else;" it may be said that to many automobile owners the duty to drive within the speed limits means a prediction of fine and nothing else, to other groups the duty to return a true list to the assessors means the prediction of trouble and nothing else; to many labor unionists the duty not to picket means the prediction of a fine and nothing else; whereby the criminal law in so far as it is enforced by fines becomes indistinguishable practically from a license, just as liability for taking property by eminent domain and liability for a wrongful conversion of property may be the same so far as consequences go. Why not "wash with cynical acid" every legal duty? Macchiavelli and Hobbes did this for political theory; and it no doubt conduces to clear notions of economics to consider business as business. But it inevitably raises further questions. If we take all moral implications out of the law and regard it as a system of predictions, similar, let us say, to the meteorological forecasts of frosts and storms, can we maintain the respect for the authority of the law which we all agree that members of other groups than our own should maintain? No one would object to evading by any possible means the predicted consequences in weather; why not treat legal proba-

bilities in the same way? It may be replied that it does not affect the morals of law observance if we make a sharp separation between the two questions: "What is the law?" and "Why should I observe it?" I may study in physics the trajectories of bullets and still leave undisturbed the authority of my conscience over the question of shooting my fellowmen. Shall morals be kept as scrupulously out of the law school as the physicist would keep it out of the laboratory? It might be added that morals itself was stated by the Utilitarians as a system of predictions, Paley extending the predictions to a future life.

Possibly it would help us toward clear thinking if we could make such an absolute separation between the language of law and the language of morals as Justice Holmes suggests. And yet we must frankly recognize the dangers of such a separation. It is indeed the danger that besets every professional point of view in so far as it is scientific and therefore abstract. William James writes, "One well might add that most human institutions, by the purely technical and professional manner in which they come to be administered, end by becoming obstacles to the very purposes which their founders had in view."[1]

And I do not think that Justice Holmes would wish to have the law studied purely from the bad man's point of view. At any rate, his discussions of the part of historical study and of present ends to be achieved take us far deeper than a system of probabilities and forecasts. Despite his own historical researches he looks forward "to a time when the part played by history in the explanation of dogma shall be very small, and instead of ingenious research we shall spend our energy on a study of the ends sought to be attained and the reasons for desiring them." (p. 195.) Or again, "In these days the justification of a law for us cannot be found in the fact that our fathers always have followed it. It must be found in some help which the law brings toward reaching a social end which the governing power of the community has made up its mind that it wants." (p. 225.) And in his address at the dedication of the Northwestern University Law School building he expresses his confidence that the teaching of its dean will send men forth "with a pennon as well as with a sword."

What are the ends sought to be attained in the law and the reasons for desiring them? Negatively there are in Justice Holmes' view no absolute or universally valid ends which can be determined *a priori*. "With absolute truth I leave absolute ideals of conduct equally on one side." Positively "the law can ask no better justification than the deepest instincts of man." "There is every reason for trying to make our desires intelligent," but "deep-seated preferences cannot be argued about."[2] There are indeed two necessities, the first absolute, the second of less degree but practically general, namely, that we should live, and live in society; and yet the fact that people wish to live at all is itself an arbitrary fact. If we accept these two necessities then we can discover what rules we must follow if we wish to live and if we wish to live with others.

If we come to specific proposals Justice Holmes is cautious. "I like to see what the bill is going to be before I order a luxury." Considering wealth either from the point of view of consumption or from that of power of command he does not see cause for serious complaint. As regards the consumption of actual products—"the many consume them now." "The great body of property is socially administered now." The function of private ownership is to divine in advance the equilibrium of social desires—which socialism would have to divine but which under the illusion of self-seeking is more poignantly and shrewdly foreseen. As regards the power of command involved in great fortunes "some one must exercise that command, and [that] I know of no way of finding the fit man so good as the fact of winning it in the competition of the market." (p. 281.). "Social regeneration * * * cannot be affected appreciably by tinkering with the institution of property, but only by taking in hand life and trying to build a race." (p. 306.) For most evils "the main remedy is to grow more civilized." (p. 296.)

To discuss the three points laid down as to consumption, economic power, and eugenics or euthenics vs. effects of property would take us far. There is a tendency at present among critics of the present order to fasten upon the inefficiency of the system, rather than upon its inequalities, as the weakest point. Certainly many who were close to the inside of things during the war were very skeptical of the proposition that to be carrying on industry for profit solely is bound to give society the best production. It was more than rumored that the reason why many business men proved useless as managers in time of stress was that they had thought so long in terms of profits they could not think in terms of production. And as to the test proposed for fitness to command, viz., "the fact of winning it in the competition of the market," the facts which are ventilated from time to time as to how the "competition of the market" is actually carried on, render one somewhat suspicious that "fit" in this case, as in the usage of Darwinism, is not to be taken in an ethical sense.

IV.

We have left no space to do more than mention the ultimate values of life as the justice sees them. To live, to realize our spontaneity and prove our powers, for the joy of it, are enough to keep us in the fight, and imagination which takes us beyond our skins "justifies the sacrifice even of our lives for ends outside of ourselves." Lack of an "absolute" does not mean lack of vista; modesty as to our knowledge does not justify skeptical scorn for the world in which we are placed, and which has within it all that we believe and love." As for life's greatest opportunities "I doubt if there is any more exalted form of life than that of a great abstract thinker, wrapt in the successful study of problems to which he devotes himself, for an end which is neither unselfish nor selfish in the common sense of those words, but is simply to feed the deepest hunger and to use the greatest gift of his soul." (p. 224.) Yet it is not after all the scholar's life that appeals as the fullest form of activity. "But after all the place for a man who is complete in all his powers is in the fight. The professor, the man of letters, gives up one-half of life that his protected talent may grow and flower in peace."

Many writers have written huge volumes of philosophy which give less food for thought than these *Essays;* they are a noble counterpart to the work of the author's friend William James.

1. William James, *A Pluralistic Universe*, p. 96.
2. For a critical discussion of this, see Bode in the *International Journal of Ethics* for July, 1919.

PROGRAM OF ANNUAL ASSOCIATION MEETING

Cincinnati, Ohio, August 31 and September 1 and 2

MEETINGS

All meetings of the Association will be held in the Ball Room at the Hotel Sinton.

The Executive Committee will meet on Tuesday, August 30, at 8:30 p. m., in Parlor F Mezzanine Floor), Hotel Sinton.

The General Council will meet in the Parlor F (Mezzanine Floor), Hotel Sinton. The first meeting of the General Council will be held on Wednesday, August 31, at 9:00 a. m.

The Ohio Bar Association is holding its meeting this year at the same time and place as the American Bar Association, and all members of the Ohio and Cincinnati Bar will be welcome at the meetings of the American Bar Association.

REGISTRATION

The Offices of the Secretary and Treasurer will be located in the Hotel Sinton, Tea Room, (Main Floor) and will open for registration of members and delegates and for the sale of dinner tickets, on Monday morning, August 29, at 10:00 o'clock.

BUSINESS PROGRAM OF THE ASSOCIATION

Wednesday Morning, August 31, at 10 O'clock

Acting President Hampton L. Carson, of Pennsylvania, will preside at this session.

Addresses of welcome, on behalf of Ohio State Bar Association, by Harry L. Davis, Governor of Ohio, and on behalf of the Cincinnati Bar Association, by John Galvin, Mayor of Cincinnati.

Announcements.
Report of the Secretary.
Report of the Treasurer.
Report of the Executive Committee.
Nomination and Election of Members.

In the place of the late President, James M. Beck, of New York, will deliver an address on "The Spirit of Lawlessness."

State delegations will meet in the Ball Room (Main Floor) Hotel Sinton at the CLOSE of this session to nominate members of the General Council, and to select nominees for Vice-President and Local Council for each State.

Wednesday Afternoon, August 31, 2:00 O'clock

Daniel W. Iddings, President of the Ohio State Bar Association, will preside at this session.

2:00 p. m. Annual Business Meeting of Ohio State Bar Association.

4:00 p. m. Joint Session of American Bar Association and Ohio State Bar Association. Address by Harry M. Daugherty, Attorney-General of the United States.

Wednesday Evening, August 31, at 8:00 O'clock

Elihu Root, of New York, will preside at this session.

Address: "Our Brethren Overseas," by John W. Davis, of New York.

Address by Rt. Hon. Sir John A. Simon, K. C., of London, former Attorney-General of England.

Presentation of Memorial Tributes to Edward Douglass White, William A. Blount and Stephen S. Gregory.

Election of the General Council.

Thursday Morning, September 1, at 10:00 O'clock

Frederick W. Lehmann, of Missouri, will preside at this session.

Reports of Sections and Committees. The names of Chairmen are given below.

The consideration of the Reports will begin promptly at 10:00 o'clock.

SECTIONS

10:00 a. m. Criminal Law. Edwin M. Abbott.
10:05 a. m. Comparative Law. Robert P. Shick.
10:10 a. m. Judicial Section. Charles A. Woods.
10:20 a. m. Legal Education. Elihu Root.
10:30 a. m. Patent, Trade-Mark and Copyright Law. A. C. Paul.
10:40 a. m. Public Utility Law. Bentley W. Warren.
10:50 a. m. National Conference of Commissioners on Uniform State Laws. Henry Stockbridge.
11:00. a. m. Conference of Bar Association Delegates. Stiles W. Burr.

COMMITTEES

11:10 a. m. Professional Ethics and Grievances. Edward A. Harriman.
11:20 a. m. Commerce, Trade and Commercial Law. Francis B. James.
11:40 a. m. International Law. Charles Noble Gregory.
11:50 a. m. Insurance Law. Arthur I. Vorys.
12:00 m. Publicity. Martin Conboy.
12:10 p. m. Memorials. W. Thomas Kemp.
12:15 p. m. Jurisprudence and Law Reform. Everett P. Wheeler.
1:00 p. m. *Adjournment.*
2:30 p. m. Excursion (to be announced later).

Thursday Evening, September 1, at 8:00 O'clock

George Sutherland, of Utah, will preside at this session.

Address: "Without a Friend," by Charles S. Thomas, of Colorado.

Reports of Committees. The names of Chairmen are given below.

9:15 p. m. Admiralty and Maritime Law. Robert M. Hughes.
9:25 a. m. Noteworthy Changes in Statute Law. Thomas I. Parkinson.
9:35 p. m. Drafting of Legislation. William Draper Lewis.
9:40 p. m. Uniform Judicial Procedure. Thomas Wall Shelton.
9:50 p. m. *Adjournment.*

Friday Morning, September 2, at 10:00 O'clock

Hampton L. Carson, of Pennsylvania, will preside at this session.

A Symposium on the general subject "The Administration of Criminal Justice," under three subtopics as follows:

10:05 a. m. "Unenforceable Law," by Raymond B. Fosdick, of New York.
10:30 a. m. "The Illegal Enforcement of Criminal Law," by Luther Z. Rosser, of Georgia.
10:55 a. m. "The Adjustment of Penalties," by Marcus A. Kavanaugh, of Illinois.
11:20 a. m. General Discussion by Association.
12:45 p. m. Nomination and Election of Officers. Adjournment at 1:00 o'clock.

Friday Afternoon, September 2, at 2:30 O'clock

Geo. T. Page, of Illinois, will preside at this session.

Reports of Committees. The names of Chairmen are given below.

2:35 p. m. Membership. Frederick E. Wadhams.
2:45 p. m. Change of Date of Presidential Inauguration. William L. Putnam.
3:00 p. m. Classification and Restatement of Law. James D. Andrews.
3:15 p. m. Legal Aid Work. Reginald Heber Smith.
3:30 p. m. Aviation. Charles A. Boston.
Miscellaneous Business.
Adjournment *sine die*.

Friday Evening, September 2

William H. Taft, of Connecticut, will preside at the Dinner.

Annual Dinner at 7:00 p. m.
nouncements.)

Dinner to Ladies at 7:00 p. m.

Saturday, September 3

All day *Excursion* to Dayton, Ohio, as guests of Montgomery County Bar Association.

Subsidiary and Allied Bodies

CONFERENCE OF BAR ASSOCIATION DELEGATES

The Conference will meet on Tuesday, August 30. There will be three sessions on that date, at 10 a. m., 2 p. m., and 8 p. m., respectively.

The sessions will be held in ball room (main floor), Hotel Sinton.

The following matters will be considered:

(1) Reports from each local and state bar association on its activities during the past year, with special reference to the following questions:

1. What are state and local bar associations doing to impress upon the people of their states and communities the vital importance of respect for the law?
2. How can the influence of such associations in that field be increased?
3. What are the state and local bar associations doing to promote knowledge and understanding on the part of the people of their states and communities of the fundamental principles of American institutions?

(2) Report on the matter of State Bar Organization.

(3) Discussion of the question—"The Duty and Responsibility of the Bar in the Selection of the Judiciary." The discussion on this question will be led by William D. Guthrie, Esq., for many years Chairman of the Judiciary Committee of the Association of the Bar of the City of New York.

(4) Conference on Professional Ethics, under the auspices of the Committee on Professional Ethics and Grievances of the American Bar Association. This conference will take place at the evening session.

(5) Election of officers.

COMPARATIVE LAW SECTION

The session will be held in Parlor G (mezzanine floor), Hotel Sinton, Wednesday afternoon, August 31, at 2:30 o'clock. It will be open to the public. (The Council will meet at 2 p. m. same day in Parlor G (mezzanine floor), Hotel Sinton.

Robert P. Shick, Secretary of Section, will preside.

The order of business will be as follows:

Statement of the Chairman as to organization of the Section.
Treasurer's Report.
Address by Hon. Manoel de Oliveira Lima, of Brazil, "New Constitutional Tendencies in Latin America."
Election of Officers and Council.
New Business.
Membership of the Section is of three classes:
Class A.—All members of the American Bar Association upon enrollment.
Class B.—State Bar Associations, Law Schools, Law Libraries, Institutions of Learning, City and County Bar Associations, upon approval, to send two delegates each.
Class C.—Distinguished foreign jurists, legislators or scholars elected as honorary members.

JUDICIAL SECTION

The Section will hold its session on Tuesday, August 30, 2:30 p. m., in Rooms 5 and 6 (ball room floor), Hotel Gibson.

Charles A. Woods, of South Carolina, Chairman of the Section, will preside.

An address will be delivered by William Howard Taft, Chief Justice of the United States.

Details of the meeting will be announced later.

SECTION OF PATENT, TRADE-MARK AND COPYRIGHT LAW

The session will be held in Parlor H (mezzanine floor), Hotel Sinton, on Wednesday, August 31, 2 p. m.

A. C. Paul, of Minnesota, Chairman of the Section, will preside.

Address—A. C. Paul, Chairman.

Report of Committee on Revision of United States Trade-Mark Statutes—Edward S. Rogers, of Illinois, Chairman.

Discussion.

A meeting of the Council of the Section has been called for Tuesday, August 30, at 2 p. m., Hotel Sinton.

SECTION OF LEGAL EDUCATION

The Section will hold its first session in Rooms 3 and 4 (ball room floor), Hotel Gibson, on Tuesday, August 30, 2:30 p. m.

The second session of the Section will be held in Rooms 3 and 4 (ball room floor), Hotel Gibson, on Wednesday, August 31, at 2 p. m.

Elihu Root, of New York, Chairman of the Section, will preside.

FIRST SESSION.

Annual address of Elihu Root, chairman of the Section.
Report of Secretary.
Report of Council.

SECOND SESSION.

Presentation and discussion of report of Special Committee as to action to be taken to strengthen the character and improve the efficiency of those admitted to the practice of law.
Election of Officers.

SECTION OF PUBLIC UTILITY LAW

The fourth annual meeting of the Section will be held in Room 7 (ball room floor), Hotel Gibson, on Tuesday, August 30, 1921.

There will be three sessions of the Section: 10 a. m., 3 p. m., and 8 p. m.

Bentley W. Warren, Chairman of the Section, will preside.

Tuesday, August 30, 10 A. M.

Announcement of death of Stephen S. Gregory, of Illinois, member of the Council of the Section. Memorial address by William H. Burges, of Texas.
Address of Bentley W. Warren, of Massachusetts, Chairman.
Report of Secretary.
Appointment of Committees.
Address, "Public Utility Regulations in Ohio, with Special Reference to Street Railroads," by Joseph Wilby, of Ohio.
Discussion.
Questions submitted by members of the Section of which discussion is desired:

(a) Under what circumstances is a provision in a municipal franchise fixing rates legally binding upon a utility and a municipality, and to what extent?

(b) May a utility under the law fix a rate above the value of the service, so long as it does not exceed an adequate return?

(c) How can the value of the service be ascertained to meet the legal requirement?

(d) Is the present value of the property, in view of the high prices, a proper basis for a commission to fix rates?

(e) What is the legal duty of a commission, when a rate of return formerly adequate has become by reason of higher interest paid investors no longer attractive to capital?

(f) Should not a sliding scale of rates, depending on factors of cost, be fixed so as to adjust themselves from time to time to meet the legal rule of a reasonable rate and fair return?

(g) Should public service automobiles on highways be allowed to operate in competition with street railways, and if so, to what extent, and may such service lawfully be carried to the supplanting of such railways?

(h) What will the effect of the general use of public service automobiles on highways carrying passengers and freight, be upon street railways and steam railroads, respectively, and how far may or should they be legally restrained, if at all?

(i) In commission hearings how far is it wise to disregard legal rules of evidence, under the legislative permission not to "be bound by the technical rules of legal evidence?"

Miscellaneous business.

Tuesday, August 30, 3 P. M.

Address, "Transit Tendencies in New York City," by LeRoy T. Harkness, of New York.
Discussion.
Discussion of subjects submitted at morning session.
Reports of Committees.
Election of Officers.
Miscellaneous business.

Tuesday, August 30, 8 P. M.

Address, "Legal and Practical Aspects of Co-operative Use of Carriers' Facilities," by A. G. Gutheim, of District of Columbia.
Paper, "Some Legal Aspects of the New York Harbor Problem and Its Interstate Relation," by Julius Henry Cohen, of New York.
Discussion.
Continuation of discussion of subjects submitted at morning session.
Miscellaneous business.
Adjournment.

SECTION OF CRIMINAL LAW

The first annual meeting of the Section will be held in Parlor H (mezzanine floor), Hotel Sinton, on Tuesday, August 30. There will be two sessions of the Section: 2:30 p. m. and 8:30 p. m.

Tuesday, August 30, 2:30 P. M.

Address of Welcome—Hon. Nelson Schwab, Assistant District Attorney, Cincinnati.
President's Address—Hon. Ira E. Robinson, Grafton, W. Va.
Discussions—"Reforms in Criminal Procedure."
Report of Secretary-Treasurer—Edwin M. Abbott, Philadelphia, Pa.

Tuesday, August 30, 8:30 P. M.

Paper—"Should Verdicts Be Unanimous in Criminal Cases?"—Hon. James R. Clark, U. S. District Attorney, Cincinnati.
Discussion.
Paper—Hon. E. W. Sims, former U. S. District Attorney, Chicago, Ill.
U. S. Senator Seldon P. Spencer, of Missouri, and Dr. William Healey, of Boston, Mass., will also discuss "Reforms in Criminal Legislation."

NATIONAL ASSOCIATION OF ATTORNEYS-GENERAL

The Association will meet in Parlor F (mezzanine floor), Hotel Sinton. There will be three sessions: on Monday, August 29, 2 p. m., and Tuesday, August 30, 10 a. m., and 2:30 p. m.

Clifford L. Hilton, of Minnesota, President, will preside.

(Details of program will be announced later.)

Entertainments

ANNUAL DINNER

The Annual Dinner of the Association will be given in the ball room, Hotel Gibson, on Friday, September 2, at 7 p. m. William H. Taft, of Connecticut, will preside.

A dinner will be given at the same hour in the Ball Room, Hotel Gibson, to the ladies who accompany members and guests of the Association. *Tickets for the dinner to the ladies may be obtained at the Treasurer's office.*

EXCURSIONS

Details of excursion on *Thursday afternoon* to be announced later.

On Saturday, September 3, an all-day excursion to Dayton, Ohio, will be given by the Montgomery

County Bar Association to members and guests of the American Bar Association and ladies accompanying them.

Informal program will include:

(a) Inspection of airplane activities centering here in "the birthplace of aviation," with airplane rides for those desiring, and such test by flight and otherwise as will demonstrate the immediate need of state and national legislation regulating aeronautics.

(b) Inspection of comprehensive flood prevention project, including reservoir dams, now nearing completion in the Miami valley.

(c) Complimentary luncheon and automobile ride for all guests.

4 P. M. Informal meeting at N. C. R. School House. Addresses. General discussion on the subject of the Law of Aviation.

5:30 P. M. Lawn party and supper at "Far Hills," suburban home of John H. Patterson, president of the National Cash Register Company.

7:30 P. M. Special train returning to Cincinnati.

Excursion tickets may be obtained at the Treasurer's office.

Harvard Law School Men's Luncheon

Following a custom successfully begun at the meeting of the American Bar Association last year in St. Louis, there will be a luncheon of men who attended the Harvard Law School present at the forthcoming meeting of the American Bar Association. The luncheon will take place at the University Club, Fourth and Broadway, on Friday, September 2nd, at 1 o'clock sharp, and will not interfere with any plans of the Association. At this time it cannot be stated definitely which of the members of the faculty will be present, in addition to Professor Austin W. Scott, who has agreed to attend and make an address at the luncheon, and Professor Williston, who writes that he intends to be in Cincinnati during the meeting of the Commissioners on Uniform State Laws and that it will give him great pleasure to attend the luncheon. Dean Pound has advised the committee that, owing to his contemplated trip abroad, his plans are uncertain, but he will speak to the other members of the faculty regarding their attending the luncheon. The price of the luncheon will be $1.50. Those contemplating attending are asked to notify Murray Seasongood, Citizens National Bank building, Cincinnati, Ohio, so that proper arrangements may be made.

E. A. GILMORE,
E. M. GROSSMAN,
CLAIR MCTURNAN,
REGINALD HEBER SMITH,
MURRAY SEASONGOOD,
Committee.

Meeting of Secretaries

A meeting of the Secretaries of the various State Bar Associations will be held at the Hotel Sinton, Cincinnati, Ohio, at 12:30 p. m. on August 30, 1921, when an informal luncheon will be served. Thereafter the various subjects for discussion will be presented. The purpose of the meeting is to bring about a closer understanding and co-operation among the Secretaries of the State Bar Associations. The meeting has been called at the suggestion of Mr. R. Allan Stephens, Secretary of the Illinois Bar Association.

HOTEL ACCOMMODATIONS IN CINCINNATI, OHIO

(All hotels European plan, except as stated. Prices named are per day.)

Name	Location	Single room and bath	Double room and bath
Hotel Gibson ..	4th and Walnut...	$2.50 up	$4.25 up
Hotel Sinton .	4th and Vine.....	3.50 up	5.50 up
Havlin Hotel..	Vine & Opera Pl..	3.00 up	5.00 up
Hotel Metropole	6th and Walnut...	2.50 up	4.50 up
Grand Hotel .	4th and Central...	2.50 up	4.00 up
Palace Hotel .	6th and Vine.....	2.00 up	3.00 up
Emery Hotel .	421 Vine	2.50	4.50
Hotel Alms .. (Amer. plan)	McMillan & Alms Place	4.00	7.00

Mr. Ben B. Nelson, Fourth National Bank Building, Cincinnati, Ohio, has charge of reservations for members and guests. In writing to Mr. Nelson please state:

a. Preference of hotels;
b. Time of arrival;
c. Period for which rooms are desired;
d. Whether single or double room desired;
e. How many persons will occupy each room.

Members who wish to do so are at liberty to make direct arrangements with hotel preferred.

Make your reservations early. Notify Mr. Nelson promptly of any cancellations.

OFFICERS AND COMMITTEES

(Continued from page 318)

Representatives of American Bar Association to Conference of Delegates.

HOLLIS R. BAILEY, Boston, Massachusetts.
JOHN H. VOORHEES, Sioux Falls, South Dakota.
EDWIN T. MERRICK, New Orleans, Louisiana.
LAWRENCE MAXWELL, Cincinnati, Ohio.
WILLIAM H. BURGES, El Paso, Texas.

Change of Date of Presidential Inauguration.

WILLIAM L. PUTNAM, Boston, Massachusetts.
WILLIAM L. MARBURY, Baltimore, Maryland.
NATHAN WILLIAM MacCHESNEY, Chicago, Illinois.
JOHN B. SANBORN, Madison, Wisconsin.
WILLIAM C. KINKEAD, Cheyenne, Wyoming.

Classification and Restatement of the Law.

JAMES DeWITT ANDREWS, New York, New York.
ADOLPH J. RODENBECK, Rochester, New York.
ROSCOE POUND, Cambridge, Massachusetts.
HARLAN F. STONE, New York, New York.
EUGENE C. MASSIE, Richmond, Virginia.
GEORGE P. COSTIGAN, JR., Chicago, Illinois.
EDWARD Q. KEASBEY, Newark, New Jersey.
ROBERT F. BLAIR, Tulsa, Oklahoma.
GEORGE B. ROSE, Little Rock, Arkansas.

Law of Aviation.

CHARLES A. BOSTON, New York, New York.
ORRIN N. CARTER, Chicago, Illinois.
WILLIAM P. BYNUM, Greensboro, North Carolina.
GEORGE G. BOGERT, Ithaca, New York.
WILLIAM P. MacCRACKEN, Chicago, Illinois.

Legal Aid.

REGINALD HEBER SMITH, Boston, Massachusetts.
ERNEST L. TUSTIN, Philadelphia, Pennsylvania.
FORREST C. DONNELL, St. Louis, Missouri.
WILLIAM R. VANCE, New Haven, Connecticut.
EDWARD Q. KEASBY, Newark, New Jersey.

ACTIVITIES OF STATE BAR ASSOCIATIONS

Secretaries of State Bar Associations are requested to send in news of their organizations. "News" means not only official statements of time, place and programs of regular meetings and the action there taken, but also reports of other interesting activities. In brief, anything showing what the membership, committees and leaders in the State Bar Association are thinking and doing with respect to matters of professional interest. Secretaries can help to make this department one of the most interesting in the Journal. The collection of reports will enable each State Bar Association to see every month what the others are doing and to avail itself of any suggestion contained in their activities. Contributions should be mailed not later than the 25th of each month and should be addressed to the editorial office, 1612 First National Bank Building, Chicago.

CALIFORNIA

Under the direction of the California Bar Association a concerted effort is to be made to organize the lawyers of the State into county bar associations, where such organizations do not now exist, and to stimulate interest in such organizations where they are at present inactive.

This is for the purpose of strengthening the membership of the California Bar Association, and for the purpose as well of making an organized resistance to the referendum proposed by the California Bankers' Association against the Sample bill, prohibiting the unlawful practice of the law. The lawyers had this measure enacted at the recent session of the Legislature.

ILLINOIS

With the closing of the annual meeting of the Association on June 11, 1921, the record of the year's activities became history and plans were immediately perfected for the most successful year of all the history of the Association for 1921-1922. President Silas Strawn will be absent on a European trip until August 15, during which time the annual dues-paying season will be on and the annual report printed for delivery to the members in September.

The first thing for the new year will be the meeting of the American Bar Association at Cincinnati. During the past year over five hundred Illinois lawyers have joined the American Bar Association and effort is being made to have the largest atendance of any State at the meeting. Plans are under way for entertainments of peculiar interest to the Illinois lawyer and we anticipate a very large delegation will make the trip.

The local bar associations of the State are very active during the summer period. On June 6 every Circuit Judge in the State was elected or re-elected. In most of the districts there was no contest and, with but one exception, every Circuit Judge outside of Cook County who was candidate for re-election was re-elected—which is a high tribute to the character of the Circuit Judges of Illinois. Immediately following the election a large number of the local bar associations gave dinners or social functions in honor of the elected Judges. At Mt. Vernon the Judges were sworn in by the Secretary of State at a bar association dinner, while receptions or dinners to the Judges were given by the local bar associations of McLean, Peoria, Macon, Wayne, Knox, Livingston and other counties. Such occasions have proved to be of great assistance in dignifying the bench in the eyes of the public.—R. ALLAN STEPHENS.

INDIANA

Special features of the meeting of the Indiana Bar Association at the Country Club at Indianapolis July 13 and 14 were an address by Albert J. Beveridge and one by F. Dumont Smith of Kansas on "The Police Power and Industrial Relations." The President's address by Elmer E. Stevenson was on "Our Profession." Lewis A. Coleman gave a paper on "Advantages of No Par Value Stock," and Cassius C. Shirley one on "Some Phases of Our State Constitution." A symposium on "The Pending Constitutional Amendments" was led by James W. Noel and William L. Taylor.

IOWA

At the meeting of the Iowa Bar Association held at Waterloo June 23 and 24 Hon. Jesse A. Miller of Des Moines was elected President; James A. Debitt, of Oskaloosa, Vice-President; and H. C. Horack, of Iowa City, Secretary and Treasurer.

The annual address was delivered by Senator C. S. Thomas of Denver, Colorado. His subject was "Lawyers and Legislation." He emphasized the influence of lawyers on legislation and their duty to exercise it in behalf of laws that were sane, that showed no class favoritism and that gave no special privileges.

The President's address was on "Police Power in Wartime" and was delivered by Hon. Charles M. Dutcher of Iowa City. Other interesting features of the program were the address of welcome by Mr. Sherman T. Mears of Waterloo and the reply by Mr. Wesley Martin of Webster City; an address on "Preventive Justice" by Dean Henry M. Bates of Ann Arbor, Michigan; an adress by Judge E. G. Albert of Jefferson on "The Right of a Public Utility to Suspend Service."

Sioux City was selected as the place for the next annual meeting.

KENTUCKY

At the twentieth annual meeting of the Kentucky State Bar Association, held at Ashland, July 6 and 7, the President's address was delivered by Hon. W. L. Porter of Glasgow. Other interesting addresses on the program were: "Mines and Minerals," by LeWright Browning of Maysville; "Some Great Lawyers of Kentucky," by Judge Rollin Hurt of Frankfort; "Declaratory Judgments," by Judge Thomas R. Gordon of Louisville; "Bar Organization," by President Daniel W. Iddings of the Ohio Bar Association; "Stare Decisis," by Judge C. S. Nunn, of Marion; one by Hon. Lawrence Maxwell, Jr., of Cincinnati, and one by John D. Carroll of Frankfort, former Chief Justice of the Court of Appeals of Kentucky, who made a plea for personal liberty based on a text from the Declaration of Independence.

The address of welcome was delivered by Hon. John F. Hager of Ashland.

At the banquet held on the evening of July 7 Judge John F. Hager, of the Boyd County Bar, presided as

Toastmaster, and the toasts were responded to by Mayor Dysard of Ashland, Hon. Frank Stowers, of Pikeville, Hon. A. M. J. Cochran, Judge of the District Court for the Eastern District of Kentucky, and Hon. W. L. Porter, retiring President of the Kentucky State Bar Association.

Among other features of the program were a luncheon at the Country Club, given by the Kiwanis and Rotary Clubs of Ashland, and a luncheon at the Elks Club, given by the Boyd County Bar Association.

MICHIGAN

The recent meeting of the Michigan Bar Association held at Flint adopted a recommendation of the President, Mr. James O. Murfin, that the Association publish a Journal (probably a quarterly) under the auspices of the Faculty of the Law Department of the University of Michigan, to be taken charge of by the newly elected Secretary, Professor Edson R. Sunderland of Ann Arbor. The first issue will probably be in the Fall.

MINNESOTA

The annual meeting of the Minnesota Bar Association will be held at Duluth July 26, 27 and 28. The first session will be devoted to a consideration of "The Legal Aspects of the Industrial Problem." The speakers will be Glenn E. Plumb, author of the Plumb Plan, whose subject will be "Industrial Democracy;" Fred Dumont Smith, who will explain the Kansas Industrial Court Law; Dr. W. E. Hotchkiss, National Director of Industrial Relations for the Federation of Clothing Manufacturers, who will discuss the theory and operation of unofficial courts in the settlement of labor disputes, under the title "Beginnings of Constitutional Law and Government in the Men's Clothing Industry;" and Charles Donnelly, President of the Northern Pacific Railway Company, who will treat the subject from the employers' viewpoint.

At the session of Wednesday, July 27, Honorable Edward Lees, of the Minnesota Supreme Court, will preside.

In connection with the report of the Committee on the Incorporation of the Bar, Hon. Clarence N. Goodwin, of Chicago, will speak on "Self-Government of the Bar." Judge Goodwin is Chairman of the Committee on State Bar Organizations of the Conference of the State Bar Association Delegates to the American Bar Association.

In connection with the report of the Committee on Jurisprudence and Law Reform, Prof. N. T. Dowling of the University of Minnesota Law School, who was formerly with the legislative bureau of Columbia University, and Mr. H. E. Randall of the West Publishing Company, will discuss the subject of Statute Revision and explain the various schemes for handling the problem.

At the session of Thursday, July 28, Hon. J. A. A. Burnquist will preside.

The day will be devoted to the subject of Penology. The speakers will be Thomas Mott Osborne, of Auburn, New York, who spent several days in Auburn prison in 1913, under conditions of a convict, and was afterwards Warden of Sing Sing prison; and Honorable C. E. Vasaly, of St. Cloud, who will tell of Minnesota's achievements in the care of criminals and defectives.

There will be, in addition, various entertainments during the meeting, including an outing given by the Eleventh District Bar Association, a boat ride on Lake Superior, with a dance in the evening, and the annual banquet of the Association to be held Thursday evening, July 28.

TEXAS

Fort Worth has been selected as the meeting place for the 1922 Convention of the Texas Bar Association.

WASHINGTON

Our annual meeting will be held jointly with the Prosecuting Attorneys' Association at Olympia, Wash., July 21-23, 1921. We are confident that not less than 300 lawyers will be in attendance.

We are organized under the "affiliation plan;" i. e., to become a member of the State Bar Association a lawyer must be a member of his local association, if same is affiliated with the state body. Of course the old members may retain their individual membership, but inasmuch as membership in the local body relieves the member from "direct taxation," few have retained individual membership. In those counties where there is not an association, or the association is one in name only, or the local refuses to affiliate, the lawyers may become individual members.

The affiliated locals are assessed for the support of the State organization $1.50 per 1,000 population. Individual membership dues are $4 per annum. There are thirty-nine counties in this State, some of which have only three or four lawyers, therefore nearly all of those lawyers are individual members. Of the thirty-nine counties, twenty-seven have local associations, twenty-four of which are affiliated with the State Association.

Many of our members are so enthusiastic about the results of one year's affiliation that we would like to see it adopted by the American Bar Association. Would it not be well for the State Bar Association to affiliate with the American Bar Association along a plan similar to that adopted by our county associations? In that way the local or county association would determine membership in the A. B. A., which is as it should be. There are probably 175,000 lawyers in the United States. Through this method the American Bar Association would have probably 100,000 members.

The support of the American Bar Association would be simple, as an assessment of fifty cents per capita would bring in sufficient revenue. Our association under that plan would remit to the American Bar Association approximately $900 per annum. This looks as if it would be a good subject for discussion at the meeting of the State Secretaries in Cincinnati next August.

WISCONSIN

The annual meeting of the Wisconsin State Bar Association was held at Chippewa Falls, with headquarters at the new Hotel Northern, June 23, 24 and 25. The meetings were held in the Elks' Club Rooms, which occupy the entire fifth floor of the Hotel. The Chippewa County Bar Association spared no effort to show their hospitality and to entertain the visiting members of the State Association, special entertainment being furnished for the visiting ladies. The meeting is generally conceded to have been one of the most enjoyable and profitable the Association has ever held.

The first session was held in the forenoon of June 23. Hon. Eugene O'Neill, Mayor of Chippewa Falls, gave the address of welcome. This was responded to

briefly by Mr. John C. Thompson, President of the Association, who then proceeded to deliver his annual address, the subject of which was "Extension of the Powers of the Bar." This was followed by reports of committees and business.

In the afternoon the following question was presented for discussion:

> Is the present method of litigating questions of law and fact before commissions such a departure from the common law theory of trial in open court that it should be either discarded or radically changed? And is such method especially objectionable in connection with existing provisions of appeal?

This question was opened on the side of the affirmative by Mr. J. G. Hardgrove of Milwaukee and Mr. C. T. Bundy of Eau Claire, while Mr. C. D. Jackson, of the Railroad Commission, led the negative side. Mr. John B. Sanborn of Madison and Mr. Henry Killillea of Milwaukee also took part in the discussion.

The afternoon session was followed by an automobile ride to Wissota Dam and through Chippewa's wonderful natural park, comprising some three hundred acres. Upon the return to the Hotel at 6 o'clock the members and wives were served with a buffet luncheon at the Elks' club rooms, followed by dancing.

The evening session was held at the court house, where Dr. F. L. Paxson, director of the Department of History of the University of Wisconsin, delivered an interesting address on "The Frontier's Influence on the Development of American Law."

On the following day Ex-Congressman James W. Good, formerly of Cedar Rapids, Iowa, but now practicing law in Chicago, addressed the convention on the subject of "National Finance."

The sessions of the day culminated in a banquet at the Hotel Northern, attended by upwards of 150 persons. The principal address of the evening was delivered by Hon. Charles S. Cutting of Chicago upon the "Duty of Bar Associations Toward an Elective Judiciary," in which he set forth in an interesting way the recent situation in Chicago with regard to the election of judges and their control by political factions, and how the bar association there met the situation. Other speakers of the evening were Judge Christian Doerfler of the Supreme Court, and Mr. B. R. Goggins of Wisconsin Rapids.

Hon. John M. Whitehead of Janesville was elected President for the ensuing year. Gilson G. Glasier, Madison, was chosen Secretary and Treasurer and A. A. McLeod, Madison, Assistant Secretary. The following committee chairmen were elected: John C. Thompson, Oshkosh, Judicial Committee; H. L. Butler, Madison, Amendment of Laws; Charles B. Rogers, Fort Atkinson, Necrology; B. L. Parker, Green Bay, Membership; H. S. Richards, Madison, Legal Education; Frank L. McNamara, Milwaukee, Publication.

One vice-president from each judicial circuit was elected, as follows: First, W. D. Thompson, Racine; second, H. J. Killillea, Milwaukee; third, John E. McMullen, Chilton; fourth, C. E. Brady, Manitowoc; fifth, A. W. Kopp, Platteville; sixth, R. B. Graves, Sparta; seventh, W. E. Fisher, Stevens Point; eighth, W. T. Doar, New Richmond; ninth, J. E. Messerschmidt, Madison; tenth, J. P. Frank, Appleton; eleventh, W. P. Crawford, Superior; twelfth, Paul Grub, Janesville; thirteenth, H. J. Frame, Waukesha; fourteenth, W. E. Wagener, Sturgeon Bay; fifteenth, W. F. Shea, Ashland; sixteenth, M. C. Porter, Merrill; seventeenth, E. S. Jedney, Black River Falls; eighteenth, S. M. Pedrick, Ripon; nineteenth, T. J. Connor, Chippewa Falls; twentieth, Max Sells, Florence.

LETTERS FROM BAR ASSOCIATION MEMBERS

First State to Organize Bar Association

Putnam, Conn., June 27.—To the Editor: Honorable Marvelle C. Webber, President of the Vermont State Bar Association, in his very interesting and instructive article "The Origin and Uses of Bar Associations," has inadvertently made a mistake of fact. He says that the first state to organize a state bar association was New York, and adds that such action was taken not long after the formation of the Bar Association of the City of New York in 1870; but how many years intervened between 1870 and the creation of the State Bar Association of New York Mr. Webber does not inform us. He names Illinois as the second state, following New York in 1877; Vermont the third state in 1878, and Ohio the fourth in 1880.

As one of the charter members of the State Bar Association of Connecticut, and one time its president, I am pleased to inform you that the Connecticut association was formed in 1875, former Chief Justice Origen S. Seymour being elected its first president, and that it has been in existence and functioning ever since its organization. Connecticut, therefore, is certainly the second state to organize a state bar association, possibly the first, depending upon the time elapsing between the organization in 1870 of the Bar Association of the City of New York and "a few years after" when the New York State Bar Association was formed.

I think, for the sake of historical accuracy and in justice to Connecticut, this mention should appear in the next issue of the JOURNAL.—CHARLES E. SEARLS.

Divorce in Great Britain

Topeka, Kansas, May 9.—To the Editor: "And British courts still require that a woman who wants a divorce must sue for the opposite, i.e., for restitution of conjugal rights."—Independent, N. Y. 7 May 1921, p. 503, col. 1, foot.

What is the basis for the above? Is it literally true? We are often assured that British courts have gone farther than have American courts to discard non-essentials, etc.

Hoping that a word may be given in the Journal to enlighten one who is not informed on the subject of inquiry, I am very truly, J. C. Ruppenthal.

It is not "requisite" for a woman wanting a divorce in England to sue for restitution of conjugal rights first, as stated in the article to which the above letter refers. The procedure depends on the grounds for divorce. Under the English "Matrimonial Causes Act" of 1857, section 27, a marriage may be dissolved on the petition of the husband where the wife has been guilty of adultery, while a wife can procure a divorce only where the husband has been guilty of adultery coupled with cruelty, desertion or some other element that is a ground for a judicial separation.

In other words, the British Parliament here established the policy that while the husband may secure a divorce on the ground of adultery, it is not sufficient ground for the wife, and it was doubtless moved to do this by the familiar argument that the offense in the case of the wife strikes at the very foundation and integrity of the family, whereas in the case of the

husband, no matter how serious the offense may be individually, the family and social consequences are not so great.

But it evidently occurred to some of the lawyers and law makers that the rule might be at times a trifle too strict as against the wife, and hence we find in the Matrimonial Causes Act of 1884, section 5, something analogous to the legal fictions by which the strict letter of the law has frequently been mitigated in English history. Under that act it is provided that in the event of a failure to comply with a decree for the restitution of conjugal rights the husband shall be deemed guilty of desertion, and if he has also been guilty of adultery, "the wife may forthwith present a petition for dissolution of her marriage and the court may pronounce a decree nisi for the dissolution of the marriage on the grounds of adultery coupled with desertion."

The "statutory fiction" that a refusal to comply with a decree for the restitution of conjugal rights is in itself desertion thus provides a way to supply an element which is required in addition to adultery to furnish grounds for divorce to the woman. It will easily be seen that in a given situation, where a husband has been guilty of adultery and has no intention of restoring conjugal rights to his wife, the method above outlined would probably be the simplest way for a woman to secure a divorce in England. But the statement that she must proceed in this way as a general rule is merely an illustration of the inaccuracy of speech in regard to legal matters which is perhaps a natural defect in lay articles, the primary object of which is to be interesting.

Revising Court of Claims Act

New York, June 10.—To the Editor: I am enclosing herewith, copy of letter which I have written to Senator Nelson, Chairman of the Committee on Judiciary of the United States Senate.

The bill referred to is a bill quite extensively revising the Act creating the Court of Claims.

It has occurred to me that as Editor of the JOURNAL of the American Bar Association, you may be interested in this subject.—H. T. NEWCOMB.

(COPY)

June 9, 1921.

Hon. Knut Nelson,
Chairman Committee on Judiciary, U. S. Senate,
Washington, D. C.

Dear Sir:—My attention has been attracted by S. 1936, the measure to amend sections of the Judicial Code relating to the Court of Claims, introduced by you on May 31 (calendar day, June 1), 1921, and now pending before the Committee on Judiciary.

I am a member of the bar of the Court of Claims but have never practiced extensively in that court and the suggestion which I am about to make is based upon my feeling as a citizen and a lawyer, rather than upon any interest of my own or of any client, present or prospective. I should add, however, that the situation was brought sharply to my attention by the decision of the Supreme Court in Coleman v. United States, 250 U. S. 30, rendered on May 19, 1919.

In that case, the Supreme Court was obliged to hold that *because* certain taxes had been illegally collected, the Court of Claims was without jurisdiction over a suit for their recovery. In other words, that case, like many others which could be cited, placed the United States in the rather discreditable situation of sheltering themselves behind a statute of limitations in order to retain moneys which they had illegally exacted, the illegality of the original exaction being necessary in order to support the contention that there was no jurisdiction.

No individual or corporation can plead statutes of limitations in order to avoid just obligations, without incurring odium and losing credit in the commercial world. Such statutes are entirely proper for the purpose of protecting defendants against suits brought so tardily that loss of evidence through lapse of time might work injustice. But in private litigation, a defendant is not protected by a statute of limitations unless it is specifically plead as matter of defense. The effect of this salutary rule should be, and no doubt generally is, that statutes of limitation are not plead in order to avoid just obligations, but only in cases in which defendants are able to satisfy themselves that substantial justice is served by thus summarily putting an end to the litigation. The penalty for pleading such a statute in other cases is substantial loss of reputation.

Where the United States have consented to be sued, however, it is held that statutes of limitation need not be plead but that they are conditions of the consent and therefore jurisdictional. (See Finn v. United States, 123 U. S. 227, and United States v. Wardwell, 172 U. S. 48). In other words, if a suit is brought in the Court of Claims after the period limited by Section 156 of the Judicial Code (which under S. 1936 would become Section 152), the court is now obliged to hold that it is not within the general consent given by Congress and to dismiss for want of jurisdiction. The statute of limitations is not plead by the Attorney General on behalf of the United States, but as stated by the Court of Claims in Kendall's Case (14 Ct. Cl. 124) it "is in effect a standing and ever-present plea of limitation."

The consequence of this rule is that the United States are in the situation of always availing themselves of every possible statute of limitation, irrespective of any of the conditions which in private litigation could justify resort to such plea or render resort thereto the occasion of serious discredit.

The condition which I have summarized seems to be one which Congress ought to correct. It is not creditable that the Government of the United States should not meet all just obligations and it must be considered doubtful whether Congress, in originally providing for the Court of Claims, intended that its consent to suits against the United States should be limited in the case of admittedly just and lawful claims to those brought within a short period. There are, of course, many instances in which citizens, relying upon statements made to them by officers of the Executive Department and official interpretations of laws affecting their rights, do not know what their actual rights are until other citizens, less complacent in their attitude toward administrative interpretations of law, have tested such interpretations in judicial proceedings. Thus it frequently transpires that those who protest and litigate are protected, while those who accept statements made to them by officers of their own Government are penalized for so doing.

In consideration of the foregoing, I venture to suggest an amendment to S. 1936 which would add to the section which will be S. 152, when your bill has been enacted, the following:

"And provided further, That the jurisdiction conferred upon the Court of Claims shall not be limited by this section or by any other statutes limiting the time during which any proceeding may be instituted by any claimant unless, in a particular case, the Attorney General of the United States shall plead such limitation, as a defense on behalf of the United States, and shall file with said Court of Claims, in support of said plea, a written statement, over his official signature, that, in his opinion, the said plea, if sustained, will not prevent relief to which the claimant, except for such statute of limitation, would be lawfully or justly entitled and that the just interests of the United States require that said plea should be entered."

I am attaching hereto, the form of the amendment to S. 1936 which would be necessary in order to incorporate the foregoing. Of course it may well be that there is some other and better way of accomplishing the same result. It seems to me that I am pointing to a serious defect in the present law and one which the occasion of such an enactment as you are proposing might well be utilized to remedy. With great respect, I am,

Very truly yours,

H. T. NEWCOMB.

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THE ANNUAL MEETING

The final program for the Annual Association Meeting, at Cincinnati, Ohio, August 31 and September 1 and 2, and also the programs of the Allied and Subsidiary Bodies, appear in this issue, beginning on page 424. There is also a consolidated program arranged by hours, so that it can be seen at a glance what body or bodies are meeting at a particular hour. The notice of dates for the sale of tickets in the various passenger association territories and of the method of securing reduced rates on the return trip from Cincinnati is printed on page 376 and should be read by those contemplating attendance. All arrangements have been made at Cincinnati for entertaining the Association and one of the most interesting meetings on record is in prospect.